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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

SEARIVER MARITIME, INC.,
Petitioner,

v.

EXXON SEAMEN'S UNION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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April 10, 1996

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QUESTION PRESENTED

As a result of an unannounced search, marijuana was found in the stateroom and in the suitcase of a seaman holding a safety-sensitive position on an oil tanker. The seaman refused a drug test, and was discharged for his refusal. An arbitrator ordered him reinstated to his position on the theory that the employer had not proven that the employee was the owner of the marijuana found in his room and in his suitcase. The Third Circuit acknowledged that the strong public policy in favor of a drug-free workplace forbids an arbitrator from ordering reinstatement to a safety-sensitive position of an employee who has refused a drug test and whom there was reasonable cause to test, but nevertheless upheld the arbitrator's decision. On these facts, the question presented is the following:

When drugs are found in the cabin and in the belongings of an employee who occupies a safety-sensitive position on an oil tanker, and the employee thereafter refuses a drug test and is discharged for his refusal, does public policy allow an arbitrator to order reinstatement of the employee to the safety-sensitive position?

PARTIES TO THE PROCEEDING

The petitioner is named in the caption. SeaRiver Maritime, Inc. is the successor to the business of Exxon Shipping Company. SeaRiver Maritime, Inc. is a wholly owned subsidiary of SeaRiver Maritime Financial Holdings, Inc., which is a wholly owned subsidiary of Exxon Corporation. Affiliates of Exxon Corporation that fall within Rule 29.1 are listed in Appendix J, bound separately. SeaRiver Maritime, Inc. has no subsidiaries, and no affiliates within Rule 29.1 other than those listed in Appendix J.

The respondent is identified in the caption. The respondent is a labor union which has no subsidiaries or parent companies.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to review and reverse the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, App. 1a, is reported at 73 F.3d 1287 (3rd Cir. 1996). The opinion of the district court, App. 23a, is not reported. The award of the arbitrators, App. 35a, is not reported.

JURISDICTION

The district court had jurisdiction under § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185 (1994). The Court of Appeals had jurisdiction under 28 U.S.C. § 1291 (1994), and entered judgment on January 11, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1) (1994).

STATEMENT

In May 1989, Alan Cash was employed by Exxon Shipping as a Pumpman, a safety-sensitive position, aboard an Exxon Shipping oil tanker, the *Exxon Washington*. App. 3a, 42a. The *Exxon Washington* is a 719-foot, ocean-going crude oil tanker with a capacity to carry 10,080,000 gallons of petroleum products. The duties of a Pumpman include loading and discharging petroleum products, handling ballast, performing maintenance work on the cargo system and undertaking other mechanical repairs. App. 3a. These duties directly affect the safety of the vessel's operations and as such, subject Cash to the Company's Drug and Alcohol Policy, as well as United States Coast Guard regulations pertaining to drug testing. 46 C.F.R. § 16.105(b)(3) (1995).

On May 17, 1989, Exxon Shipping performed a safety inspection for drugs, alcohol, weapons, and contraband aboard the *Exxon Washington* while at anchor in San Francisco Bay. App. 42a. The inspection team was led by a former narcotics officer, with the assistance of two trained drug-sniffing dogs. App. 43a. The scope of the

inspection included all crew quarters and public areas of the ship. App. 43a. The team conducted an inspection of the room occupied by Cash, who was present at the time. App. 43a. Upon entering Cash's room, the dog immediately "alerted" (*i.e.*, signaled) and continued to alert as it moved by the cabinets, desk, bed and walls. App. 43a. Due to the numerous alerts, a second dog was used to inspect Cash's room with the same results. App. 43a.

Based upon the dogs' reactions, the inspection team conducted a thorough search of Cash's room. During the search, the team found green plant material, undisturbed ash containing some green plant material, six marijuana seeds, and in a suitcase acknowledged by Cash to belong to him, two ends of marijuana cigarettes. App. 43a.

Following the inspection and search of Cash's room, the inspection team leader took the evidence to the Captain's room where he performed separate microscopic analysis and Duquenois-Levine tests on the ends of the marijuana cigarettes, marijuana seeds and green plant material. All tested positive for THC, the psychoactive ingredient in marijuana. App. 44a. The remaining material was placed into three evidence bags, which were sent to Rocky Mountain Laboratories for confirmation tests. App. 44a. Rocky Mountain Laboratories confirmed that the material was marijuana. App. 44a.

When Cash was informed on the ship that the material had tested positive for marijuana, he was advised, in the presence of his Union representative, that he was required under Coast Guard regulations and Exxon Shipping's Policy to provide a urine sample to be tested for the

presence of illegal drugs. App. 46a. Cash repeatedly refused to be tested and was removed from the ship on May 17, 1989. App. 46a. On June 6, 1989, Exxon Shipping terminated Cash's employment for refusing to submit to a drug test. App. 75a.

The respondent Exxon Seamen's Union took the matter of Cash's discharge to arbitration, pursuant to the collective bargaining agreement between Exxon Shipping and the Union, and the matter was heard by a three-person panel. As is customary, one arbitrator was selected by the Union, one by the Company, and the Chairman of the panel was the neutral arbitrator. The panel's decision ordered that Cash be reinstated to his former safety-sensitive position with full seniority, but denied him backpay. App. 63a. The company arbitrator dissented from the reinstatement order. App. 64a.

In their opinion, written by the chairman, the majority arbitrators acknowledged that Exxon Shipping's Policy permitted testing for drugs when "cause exists to suspect alcohol or drug misuse" and that termination was the penalty for violation of the Policy. App. 37a. The Union, however, asserted before the arbitrators that "cause to suspect . . . drug misuse" did not exist, on the ground that the Company had not proved that Cash was the owner either of the marijuana found in Cash's room, or of the marijuana cigarette ends found in Cash's suitcase. App. 57a.

Cash testified that he had been in the stateroom for only a day and a half, and that the cabin had not been

cleaned before he occupied it.[1] App. 59a. Cash denied that he was the owner of any of the marijuana found in his cabin. App. 48a, 51a. Cash acknowledged ownership of the suitcase, but denied any knowledge of the marijuana cigarette ends found in the suitcase. He testified that he had obtained the suitcase in 1987 or 1988 from another vessel, the *Exxon Benicia*, and had used it for more than a year but had never "noticed anything out of the ordinary inside of it." App. 48a. Contrary to his testimony before the arbitrators, he had previously told the Company's personnel review committee that his wife bought the suitcase. App. 48a, 51a.

In evaluating whether cause for a test was present, the chairman's opinion treated separately the marijuana found in Cash's cabin and the marijuana cigarette ends found in Cash's suitcase. The chairman held that cause for a drug test must be shown by "clear and convincing evidence," App. 59a, and that "the evidence must lead to one and only one logical conclusion." App. 42a, 60a. It appears that the chairman regarded these standards as interchangeable.

With respect to the marijuana found in Cash's cabin, the chairman found as follows:

> [I]t is not reasonable to attribute, by clear and convincing evidence, ownership of the drug materials in the cabin to Mr. Cash. As noted above, the materials were found at scattered points in the room. The 6 marijuana seeds were, according to the

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[1] The search of the vessel did not reveal marijuana in the room that Cash had previously occupied. App. 59a.

contemporaneous record, under the rug. But even if only some of them were there, it is hard to see how grievant could have gotten any under the rug. He was only in the room a short time.

. . .

The circumstantial evidence certainly does not point to only the one logical conclusion that the material belonged to grievant. The ash could have been left by others, but it is not easy to see how Mr. Cash could have avoided stepping on it if it was there all along. Still, the evidence is no stronger that he deposited the ash than that it was there and he missed it. The chairman concludes that in the absence of any drugs in grievant's previous room, the probabilities are greater that Mr. Cash did not introduce the marijuana into his cabin prior to the search of May 17, 1989 than that he did.

App. 59a-60a.

With respect to the marijuana cigarette ends found in Cash's suitcase, the Chairman made the following findings:

The matter of the suitcase is the weakest point of Mr. Cash's defense . . . .

. . .

Mr. Cash was either incorrect when he told the [personnel review committee] that his wife purchased the suitcase for him or when he testified at the arbitration that he acquired the suitcase on the Exxon Benicia. Since no doubt has been cast on his

assertion that when he got the piece it was used, that weakness of testimony may make no difference. The undiscovered cigarette ends could have been in the pouch no matter how the bag was obtained. Nevertheless, the lack of candor and/or of accuracy was not supportive of grievant. Nor was his frequent inability to recall or to answer questions directly.

Still, there is doubt how the "roaches" got in the bag. No inference can be drawn from the presence of the other marijuana in the searched room that grievant put the "roaches" in the bag. . . .

[C]ircumstantial evidence must lead to one and only one logical conclusion. That cannot be said here. Mr. Cash could not be discharged for possession of marijuana after this evidence is viewed under a just cause standard.

App. 60a-61a.

Based on these findings, the chairman drew the following conclusions about the presence of reasonable cause to require a drug test, using language that the Third Circuit fairly characterized as "not a model of clarity," App. 17a:

We must come to an *ex post* conclusion about whether there was cause to order a drug test. On May 17, 1989, in light of what Mr. Newman and his cohorts found, "cause" *did* exist. (That will create problems about grievant's refusal to take the test even if the above discussion raises questions concerning the basis for the test order.) The instant review of the findings concludes, however, that even though drug

material was discovered in grievant's cabin, sufficient question was raised about ownership of the drugs so that "cause" "reasonable cause," probable cause" or "just cause" did not exist to order a test. . . .

The chairman concludes that if Mr. Cash had taken the demanded drug test and then had grieved, a later arbitration would have found that lack of "cause" "reasonable cause" "probable cause" or "just cause" to have ordered the test on the basis of what was found in the cabin would have led to reversal of any discipline based on test results. This analysis of the findings of the search shows that a test could not have been ordered on the basis of what was discovered in the cabin.

Having said this, the chairman must rule that in refusing the drug test, grievant violated the fundamental rule that except when an order imperils health or safety, employees must first obey an order and then grieve.

App. 61a-62a.

Based on this analysis, the chairman ruled that since cause to order the test did not exist, Cash could not be discharged for refusing to take the test. App. 63a. On the other hand, the chairman found that Cash had been insubordinate in refusing to take the test, and denied him an award of backpay so as to avoid giving him a "reward for improper behavior." App. 62a.

Exxon Shipping filed an appeal from this Award, insofar as it ordered Cash's reinstatement. In an opinion dated December 8, 1994, the district court granted the Union's

motion for summary judgment to confirm and enforce the Award. App. 23a. Exxon Shipping appealed this decision to the United States Court of Appeals for the Third Circuit. In an opinion filed January 11, 1996, the Court of Appeals affirmed the decision of the district court. App. 1a.

REASONS FOR GRANTING THE PETITION

IT VIOLATED PUBLIC POLICY TO REINSTATE IN A SAFETY-SENSITIVE POSITION A SEAMAN WHO HAD REFUSED TO TAKE A DRUG TEST AFTER DRUGS WERE FOUND IN HIS CABIN AND SUITCASE

A grant of certiorari is warranted in this case since the decision below will go far to defeat the important public policy in favor of a drug-free workplace, and will have severe consequences warranting this Court's attention and correction. By requiring reinstatement, in safety-sensitive positions on oil tankers, of employees who have refused drug tests after drugs are found in their cabins and personal possessions, the decision below will measurably increase the likelihood of tanker accidents and decrease tanker safety. Tanker accidents are a serious matter. The prospect of an increase in such accidents, owing to the Third Circuit's unwillingness to enforce the public policy against drug use by seamen in safety-sensitive positions, presents grave risks to tanker crews, to the public, and to the environment.

This Court has long recognized that a court should not enforce an arbitration award if enforcement of the award

is contrary to public policy. *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948); *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 42 (1987); *W.R. Grace & Co. v. Local 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 766 (1983). As the Court said in *Misco*,

> A court's refusal to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy.
>
> . . .
>
> [H]owever, [ ] a court's refusal to enforce an arbitrator's *interpretation* of such contracts is limited to situations where the contract as interpreted would violate "some explicit public policy" that is "well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'"

484 U.S. at 42-43 (citations omitted).

This case involves the well-established public policy that the workplace should be free of drugs, and that employers should be free to require drug testing of employees holding safety-sensitive positions. Every court that has considered the matter has held that the public policy in favor of a drug-free workplace is "well-defined and dominant" within the meaning of *Misco*, and therefore that an arbitrator's award which violates that policy cannot be upheld. *Exxon Corp. v. Baton Rouge Oil & Chemical*

Workers Union, 77 F.3d 850 (5th Cir. 1996); *Exxon Shipping Company v. Exxon Seamen's Union*, 11 F.3d 1189 (3d Cir. 1993) ("*Exxon II*"); *Exxon Shipping Company v. Exxon Seamen's Union*, 993 F.2d 357 (3d Cir. 1993) ("*Exxon I*"); *Gulf Coast Industrial Workers Union v. Exxon Company, U.S.A.*, 991 F.2d 244 (5th Cir. 1993); *Delta Airlines, Inc. v. Air Line Pilots Ass'n*, 861 F.2d 665 (11th Cir. 1988); *S.D. Warren Co. v. Local 1069, United Paperworkers Int'l Union*, 815 F.2d 178 (1st Cir. 1987), *vacated*, 484 U.S. 983 (1987), *on remand*, 845 F.2d 3 (1st Cir. 1988). These rulings reflect the obvious fact that the operation of oil tankers at sea is an inherently risky and dangerous business, and that even innocent mistakes can cause catastrophic loss of life, or severe damage to the environment or to property.

Indeed, in this very case, the Third Circuit recognized, consistent with its prior decisions, the importance of the public policy at stake, and found that it would be undermined if a seaman whom there was reasonable cause to test could refuse a drug test. As the Third Circuit said:

> The federal government has manifested its strong support for drug testing of employees involved in mass transportation through the promulgation by all federal agencies governing mass transportation of regulations designed to prevent drug use by employees in safety-sensitive positions. Such regulations in most instances equate refusal to test with a "positive" test result. *See, e.g.*, 14 C.F.R. § 121.55(c) (1995) (Federal Aviation Administration); 49 C.F.R. §§ 219.213, 219.505, 219.603(b) & (c)

(1994) (Federal Railroad Administration); 49 C.F.R. § 391.95(d) (1994) (Federal Highway Administration); 49 C.F.R. § 653.35(a) (1994) (Federal Transit Administration); 10 C.F.R. § 26.27(c) (1994) (Nuclear Regulatory Commission).

> The force of our decisions in *Exxon I* and *II* would be radically undermined if we declined to take the logical next step and decide that reinstatement of an employee who refused to submit to a drug test upon a showing of reasonable cause violates public policy. Although Coast Guard regulations do not mandate discharge for an employee -- even one in a safety-sensitive position -- who refuses a drug test, we conclude that if Exxon had cause to require a test, Cash's reinstatement following his refusal would violate public policy because it would undercut enforcement of Coast Guard regulations and environmental statutes which denote a well defined and dominant public policy against permitting intoxicated crew members to operate oil tankers and other common carriers.

App. 14a (citations omitted.)

Nevertheless, the Third Circuit refused to set aside the arbitrators' decision requiring reinstatement to a safety-sensitive position of an employee who refused a drug test after marijuana was found in his cabin and his suitcase. The Third Circuit rested its decision on two grounds, both of which have the effect of rendering futile the very public policy that the Third Circuit purported to uphold.

A.

In the first place, the Third Circuit inexplicably limited the employer's public-policy right to test for drugs to circumstances where "reasonable cause" was present. App. 14a. This limitation makes no policy sense, since it is clear that a marine employer is not only entitled, but required to conduct *random* tests of employees in safety-sensitive positions. 46 C.F.R. § 16.230 (1995); *see Skinner v. Railway Labor Exec. Ass'n*, 489 U.S. 602 (1989). Specifically, a marine employee occupying a safety-sensitive position, such as Cash, is subject to Coast Guard regulations providing that an individual testing positive for drugs "shall be denied employment as a crew member or removed from duties . . . [and] shall be subject to suspension and revocation proceedings against his or her license, certificate of registry, or merchant mariner's document . . . ." 46 C.F.R. § 16.201(c) (1995); 53 FED. REG. 47,072 (1988); 46 C.F.R. § 4.06-5 (1995); Coast Guard Reasonable Cause Drug Testing Rules, App. 79a; *see Exxon I*, 993 F.2d at 361. No conceivable reason exists why a seaman occupying a safety-sensitive position, who is subject to random testing on pain of discharge, should be exempt from testing when drugs are found in his cabin and in his belongings, merely because he can convince an arbitrator that there is no "reasonable cause" to test if "there was doubt how the 'roaches' got in the bag." App. 61a. The public interest is in testing and safety, not cavilling and evasion. If there is reason to suspect an employee is using drugs on duty -- as is manifestly the case here -- public policy requires that the employee submit to a drug test. Public policy forbids rewarding an

employee who has refused to be tested by restoring him to a safety-sensitive position.

Indeed, it is the almost universal rule that a person who refuses to submit to a drug test is treated as if he or she had tested positive.[2] This requirement is universal precisely because it is recognized as absolutely necessary to implement the "well-defined and dominant public policy against the operation of a vessel under the influence of drugs or alcohol." *Exxon I*, 993 F.2d at 362. Fundamental to that policy are "regulations that require drug testing and authorize the imposition of stiff penalties on employees," since "through testing and penalties, the regulations seek to deter employees from operating vessels with impaired facilities." *Id.* at 361. As the Third

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[2] *See* 49 C.F.R. § 654.29 (1995) (Department of Transportation regulations providing that "no employer shall permit an employee who refuses to submit to a test to perform or continue to perform safety-sensitive functions"), 59 FED. REG. 7532 (1994) (identical provision); 59 FED. REG. 7302, 7321 (1994) ("the consequences for a refusal to submit to a required test are the same as if the employee had tested at .04 or greater or had violated any of the other provisions of these rules"); *State v. Todaro*, 576 A.2d 307, 308 (N.J. 1990) ("the purpose of the refusal statute is to encourage all suspected drunk drivers to take the breathalyzer test when required to do so. The statutory purpose of the implied consent law is not to punish the driver, but to protect the driving public by removing an offending driver from the highways with reasonable dispatch"); CAL. ANN. VEH. CODE § 23157 (West Supp. 1996) ("the person shall be told that his or her failure to submit to, or the failure to complete, the required chemical testing will result in a fine [and] mandatory imprisonment . . . ."); 10 C.F.R. § 26, Appendix A (1995) (Nuclear Regulatory Commission drug and alcohol testing program guidelines); 33 C.F.R. § 95 (1995) (Department of Transportation regulations concerning operation of vehicles while intoxicated).

Circuit acknowledged in this very case, "[w]ere employees permitted to refuse to submit to such chemical tests, it is difficult to imagine why any drug user would consent." App. 14a.

The strong public policy in favor of a drug free workplace will, in practical terms, become little more than a dead letter if an employer may not enforce drug testing when, as here, there is manifest reason to suspect an employee of drug use. This case illustrates the dangers better than most. The arbitrators required Exxon Shipping, in order to obtain a drug test from an employee in a safety-sensitive position, to *prove* that the employee had "ownership" of drugs found in the employee's cabin and the employee's suitcase. Such proof is, and always will be, impossible. Marijuana does not come with title deeds. If employees caught red-handed with illegal drugs in their cabins or baggage can evade testing by claiming that the drugs belonged to someone else, what drug-using employees will ever allow themselves to be tested? None. Public policy will be entirely defeated.

It bears emphasis that the only issue here is the right to *test* for drug use, and the only employees involved are those in safety-sensitive positions, whose drug use can endanger lives, property, and (in the case of oil tankers) the environment as well. An employee innocent of drug use will test negative; the case will be closed; and public safety will be preserved. Restrictions on testing protect only employees who have good reason to believe they will not pass a test. They ensure that drug-using employees in safety-sensitive positions will escape detection. They

greatly increase the likelihood that, sooner or later, such drug use will result in a disaster.

B.

Even if the Third Circuit had been right that the public policy favoring detection and prevention of drug use by those in safety-sensitive jobs is too weak to require drug tests unless "reasonable cause" is shown, it was unquestionably wrong in refusing to reexamine the arbitrators' highly eccentric conclusion that "reasonable cause" was absent unless the employer proved the employee's "ownership" of the drugs. The Third Circuit gave the following explanation for this strange result:

> The Supreme Court has made clear that findings of fact and inferences to be drawn therefrom are the exclusive province of the arbitrator. [Citing *Misco*]. That a court is inquiring into a possible violation of public policy [does not] excuse a court for doing the arbitrator's task. [Citing *Misco*, 484 U.S. at 45]. Thus, this court may not refuse enforcement even if we consider the evidence sufficient to prove that reasonable cause existed to require Cash to submit to a drug test. App. 20a.

Under the Third Circuit's decision, reinstatement of Cash must thus be upheld (a) even if the *Court* considers that reasonable cause for a test was present; and (b) even though public policy forbids reinstatement of an employee who refuses a test when reasonable cause is present.

The premise of the Third Circuit's decision is that the arbitrator's finding of "reasonable cause" precludes the Third Circuit from making its own determination concerning public policy. Perhaps such a ruling would be defensible if there were a *bona fide* factual dispute. But that is not the case. There is no issue about the facts here. No one denies that marijuana was found in Cash's cabin; no one denies that marijuana was found in Cash's suitcase. The dispute is over an issue of law: Do those undisputed facts constitute "reasonable cause" so that public policy allowed the employer to require a drug test?

Or more precisely: Given that public policy allows an employer to require a drug test of employees holding safety-sensitive positions if there is "reasonable cause" to do so, is reasonable cause present when drugs are found in the employee's cabin or suitcase? That is not a question about the facts, it is a question about the scope of the relevant public policy. And this Court has held squarely that "the question of public policy is ultimately one for resolution *by the courts*." *W.R. Grace & Co.*, 461 U.S. at 766 (emphasis added). The Third Circuit's rule would have the effect, contrary to this Court's teaching, "of ousting the courts of jurisdiction and abdicating the public policy question entirely to arbitrators." *See Gulf Coast*, 991 F.2d at 254. It should not be upheld.

CONCLUSION

For the reasons stated, this Court should issue a writ of certiorari to review the judgment below, and should reverse that judgment.

Respectfully submitted,

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Filed January 11, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5027

EXXON SHIPPING COMPANY,
Appellant

v.

EXXON SEAMAN'S UNION

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 93-cv-00689)

Argued September 11, 1995

Before: SLOVITER, *Chief Judge* ALITO, *Circuit Judge*
and RENDELL, *District Judge* *

(Opinion Filed January 11, 1996)

OPINION OF THE COURT

---

* Hon. Marjorie O. Rendell, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

SLOVITER, *Chief Judge.*

Exxon Shipping Company appeals from a district court order which declined to vacate and instead confirmed and enforced an arbitration award reinstating an Exxon employee who had been discharged for refusing to submit to a drug test. We will affirm.

I.

The collective bargaining agreement ("Agreement") between Exxon Shipping Company and Exxon Seamen's Union expired on August 31, 1987. After eight months of negotiating for a successor agreement, Exxon, in a letter sent on March 29, 1988 to all oceangoing employees, declared an impasse and advised the Union and its members that Exxon's final proposals would be implemented on April 1, 1988.

The March 29 letter stated that the terms of the new working relationship between Exxon and the Union would include, *inter alia,* the company's Drug and Alcohol Policy and any provisions of the expired Agreement that were not part of the negotiations. That "Policy Statement on Employee Alcohol and Drug Use," issued with the March 29 letter, contained the following language:

> Exxon Shipping Company may from time to time conduct unannounced searches for drugs and alcohol on owned or controlled property. The Company also has the right to require employees to submit to medical evaluation or alcohol and drug testing *where cause exists to suspect alcohol or drug misuse. A positive test result or refusal to submit to a drug test is grounds for disciplinary action, including dismissal.*

App. at 44 (emphasis added).

Exxon amplified its Drug and Alcohol Policy in a letter sent to all oceangoing employees on September 27, 1988. Exxon explained it would be aggressively enforcing its

Alcohol and Drug Policy and gave "*official notice*" that violation of the policy "will result in immediate termination from the vessel." App. at 49-50 (emphasis in original).

One of the terms of the Agreement remaining in effect during the negotiations was a "Discipline" section, which stated that "there will be posted . . . a list of rules which *shall constitute cause* for which unlicensed personnel *may be discharged* without further notice." App. at 147 (emphasis added). Included on this list was "[i]nsubordination, including failure or refusal to perform work assigned." App. at 128a. A provision of the Agreement providing for grievance and arbitration of disputes also remained in effect.

The case before us stems from Exxon's discharge of Alan B. Cash, a thirteen-year employee who started with Exxon as a seaman and advanced to chief pumpman. The duties of a pumpman include loading and unloading cargo and properly aligning pumps for the transfer of products. The parties do not dispute that it is a safety-sensitive position and is subject to Coast Guard regulations pertaining to drug testing.

On or about May 10, 1989, Cash was transferred from the Exxon Benecia in Japan to the Exxon Washington, anchored in San Francisco Bay. For the period of May 10-15, Cash resided in the second pumpman's room of the Exxon Washington. On May 15, the chief pumpman of the Exxon Washington vacated the ship and Cash moved into his room. On May 17, Exxon conducted an unannounced drug search of all the rooms of the Exxon Washington. Marijuana was discovered in various places in the chief pumpman's room which Cash had been occupying for the last day and a half.

As a result of the search, Exxon requested that Cash take a drug test. He refused. By letter dated June 6, 1989, Exxon discharged Cash, stating that he had vio-

lated Exxon's Drug and Alcohol Policy by refusing to submit to a drug test after reasonable cause for testing had been determined. The Union filed a grievance to protest Cash's discharge, and the dispute was eventually submitted to arbitration before an arbitration panel of three members, one appointed by Exxon, one by the Union, and the third a neutral arbitrator who acted as Chairman.

In an Opinion and Award dated November 27, 1992, the Chairman made the following factual findings: A "very small" amount of marijuana or marijuana residue was found in the cabin used by Cash as of May 17, 1989. This small amount was found in a number of places: green leafy material in a desk and cabinet; ash on the rug near the bed; seeds under the rug; and cigarette ends, or "roaches," in a pouch of a suitcase. App. at 91-92. No traces of drugs were found in the quarters Cash previously occupied. Cash was in the room in which marijuana was discovered for only one and a half days and for only a few hours daily during that period. A chief pumpman and another pumpman used the cabin before Cash moved into it, and other persons had access to the room because the door was left unlocked. Cash did not ask the utility men to clean his cabin because he did not want to interfere with their shore leave.

Despite the marijuana found in Cash's suitcase, the Chairman found "it is not reasonable to attribute, by clear and convincing evidence, ownership of the drug materials in the cabin to Mr. Cash." App. at 92. The Chairman noted that there were no drugs found in Cash's previous room and that it was unlikely that in his short time in the room he would have caused marijuana seeds to be under the carpet. *Id.* He also stated that "the cabin had not been cleaned at the time of the search, had been used by a number of persons in previous days, and was open to others." *Id.* The Chairman concluded that "[t]he circumstantial evidence certainly does not

point to only the one logical conclusion that the material belonged to grievant," and therefore there was no "reasonable cause" under Coast Guard regulations to demand a drug test. App. at 92-93.

The Chairman next considered whether there was cause to test Cash under the company policy. He remarked that "[t]he matter of the suitcase is the weakest point of Mr. Cash's defense against the charge that he violated company policy by introducing marijuana into his cabin." App. at 93. Cash had stated at one point that his wife had purchased the suitcase for him but testified at the arbitration that he had acquired the suitcase on a previous ship. The Chairman noted, however, that no doubt had been raised that the suitcase was used before Cash obtained it, and "[t]he undiscovered cigarette ends could have been in the pouch no matter how the bag was obtained." *Id.* He added that "[n]o inference can be drawn from the presence of the other marijuana in the searched room that grievant put the 'roaches' in the bag." *Id.*

Finding the circumstantial evidence insufficient to prove that Cash possessed marijuana, the Chairman determined Cash could not be discharged for possession under a "just cause" standard. App. at 94. He concluded with the following passage:

> We must come to an *ex post* conclusion about whether there was cause to order a drug test. On May 17, 1989, in light of what Mr. Newman and his cohorts found, "cause" *did* exist. . . . The instant review of the findings concludes, however, that even though drug material was discovered in grievant's cabin, sufficient question was raised about ownership of the drugs so that "cause" "reasonable cause", "probable cause" or "just cause" did not exist to order a test. And Mr. Shearer's testimony established that Mr. Cash's appearance and actions provided no basis for ordering a test.

> The chairman concludes that if Mr. Cash had taken the demanded drug test and then had grieved, a later arbitration would have found that lack of "cause" "reasonable cause" "probable cause" or "just cause" to have ordered a test on the basis of what was found in the cabin would have led to reversal of any discipline based on test results. This analysis of the findings of the search shows that a test could not have been ordered on the basis of what was discovered in the cabin.

Id.

The Chairman did find, however, that Cash was insubordinate in refusing to take the test, saying he "violated the fundamental rule that . . . employees must first obey an order and then grieve." App. at 95. Nevertheless, "since the order to take the drug test arose out of an incorrect evaluation of the meaning of the marijuana found in Mr. Cash's cabin, discharge for failure to accept the test is not possible." *Id.* The Chairman ordered reinstatement with full seniority but without back pay.

The opinion was that of the Chairman of the Arbitration Panel. The Panel's award was issued by the neutral chairman and the Union appointed arbitrator who concurred with the award. The Company appointed arbitrator dissented.

Exxon filed suit in district court pursuant to section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185, to vacate the arbitration award on the following two grounds: 1) that enforcement of the award would violate public policy; and 2) that the arbitration panel exceeded its authority by reinstating Cash. Both parties moved for summary judgment. The district court granted the Union's motion. The court found that because neither Exxon's policy nor the Coast Guard regulations mandate dismissal of an employee who refuses to submit to a reasonable cause test, Cash's reinstatement did not violate public policy. The court also found that

the arbitrator acted within his authority in determining that cause did not exist to discharge Cash. Exxon timely filed a Notice of Appeal.

We have jurisdiction over the district court's grant of summary judgment under 28 U.S.C. § 1291. Our review is plenary, and we apply the same standard the district court should have applied in reviewing the arbitration award. *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters,* 969 F.2d 1436, 1440-41 (3d Cir.), *cert. denied,* 506 U.S. 1022, 113 S. Ct. 660, 121 L.Ed.2d 585 (1992).

II.

In its argument that the trial court's order should be upheld, the Union emphasizes the favored treatment given arbitration awards in the courts. The Supreme Court has frequently cautioned courts of the extremely limited role they play in reviewing the decision of an arbitrator. *See United Paperworkers Int'l Union v. Misco, Inc.,* 484 U.S. 29, 36, 108 S. Ct. 364, 369-70, 98 L.Ed.2d 286 (1987). It has said that "[t]he refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 596, 80 S. Ct. 1358, 1360, 4 L.Ed.2d 1424 (1960). Thus, we must enforce an arbitration award if it is based on an arguable interpretation of the collective bargaining agreement, and we may only vacate an award if it is entirely unsupported by the record or if it reflects a "manifest disregard" of the agreement. *News America Publications, Inc. v. Newark Typographical Union, Local 103,* 918 F.2d 21, 24 (3rd Cir. 1990).

On the other hand, under an exception to the general rule, a court may vacate an award if it violates a "well defined and dominant" public policy, discerned " 'by ref-

erence to the laws and legal precedents and not from general considerations of supposed public interests.'" *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766, 103 S. Ct. 2177, 2183, 76 L.Ed.2d 298 (1983) (quoting *Muschany v. United States*, 324 U.S. 49, 66, 65 S. Ct. 442-451, 89 L.Ed 744 (1945)); *United Trans. Union Local 1589 v. Suburban Transit Corp.*, 51 F.3d 376, 381 (3d Cir. 1995). Application of the public policy exception requires a two step analysis. The threshold question is whether a well defined and dominant public policy can be identified. If so, the court must determine whether the arbitrator's award, as reflected in his or her interpretation of the agreement, violated the public policy. Exxon relies on the public policy exception on this appeal, contending that in this case both questions should be answered in the affirmative.

A.

Exxon argues that the arbitrator's reinstatement of Cash following his refusal to submit to a drug test was contrary to the well defined public policy against the operation of common carriers by individuals impaired by drugs or alcohol. This court has twice recognized such a policy in cases involving Exxon seamen. Exxon now asks us to complete a "trilogy" by finding that reinstatement of an employee in a safety-sensitive position who refuses to submit to a chemical test violates that public policy.

We first identified a broad public policy against permitting an individual to operate a vessel while under the influence of drugs or alcohol in *Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357 (3d Cir. 1993) [hereinafter *Exxon I*], which arose after an Exxon oil tanker ran aground. Helmsman Morris Foster was among the crew given a drug and alcohol test under Coast Guard regulations and Exxon's Alcohol and Drug Use Policy. Exxon fired him on the basis of its drug policy when he tested positive for marijuana. The arbitrators decided that suspension was a more appropriate penalty

than discharge, noting that there was insufficient evidence indicating that Foster had used drugs at work and that Foster had passed the Coast Guard drug screening level, which was higher than Exxon's. *Id.* at 359-60.

The district court vacated the award, and we affirmed, finding that the award requiring reinstatement violated "a 'well defined and dominant' public policy against the operation of a vessel under the influence of drugs or alcohol" reflected in the Coast Guard regulation. *Id.* at 362 (quoting *W.R. Grace,* 461 U.S. at 766, 103 S. Ct. at 2183). We referred to one regulation requiring that individuals testing positive for drugs "shall be denied employment . . . or removed from duties which directly affect the safety of the vessel's navigation or operations," 46 C.F.R. § 16.201(c) (1990), and another prohibiting those individuals from returning to work aboard a vessel unless rehabilitation is shown, *id.* § 16.370(d) (1990). 993 F.2d at 364. We concluded that the purpose of the Coast Guard regulations would be undermined and their deterrence function undercut by the reinstatement of Foster. *Id.*

We also noted that his reinstatement would be inconsistent with public policy as identified by other courts that had vacated arbitral awards reinstating operators of common carriers discharged for drug or alcohol use. *See, e.g., Delta Air Lines, Inc. v. Air Line Pilots Ass'n Int'l,* 861 F.2d 665 (11th Cir. 1988) (vacating arbitration award reinstating a pilot who flew a passenger airplane while under the influence of alcohol), *cert. denied,* 493 U.S. 871, 110 S. Ct. 201, 107 L.Ed.2d 154 (1989); *Amalgamated Meat Cutters and Butcher Workmen v. Great Western Food Co.,* 712 F.2d 122 (5th Cir. 1983) (vacating award reinstating tractor-trailer driver after he overturned company truck while intoxicated).

In holding that the arbitrators' award requiring reinstatement would violate public policy we declined to accept the union's argument that the public policy exception to enforcing an arbitrators' award could only be

applied when the award contravened a rule of positive law. We found the broader test adopted by most of the circuits to be "the sounder approach," 993 F.2d at 363, and noted that "the contours of positive law are broad enough to include not just specific rules or prohibitions but also the stated purposes behind the rules and prohibitions." *Id.* at 364. We thus held that the award reinstating Foster "violates the public policy protecting the public and the environment against operation of vessels by drug users." *Id.*

We identified a similar public policy in *Exxon Shipping Co. v. Exxon Seamen's Union*, 11 F.3d 1189 (3d Cir. 1993) [hereinafter *Exxon II*]. Seaman Randall Fris was observed in an impaired condition when he reported back one evening to the Exxon Long Beach tanker. He was discharged after a breathalyzer test disclosed a blood-alcohol level in violation of both the company's alcohol policy and Coast Guard regulations. The arbitration panel found that Fris had been intoxicated when he boarded the ship but concluded, over the dissent of the company representative, that in light of Fris' good record he should have been given an opportunity to demonstrate that his intoxication was an aberration. It thus reinstated Fris with a 90-day suspension. Once again the district court vacated the award, and we affirmed.

We held in *Exxon II* that there is a well defined and dominant public policy "that an owner or operator of an oil tanker should not be compelled to reinstate to a 'safety-sensitive' position an individual who has been found to be intoxicated while on duty on that vessel." *Id.* at 1194. We noted that under Coast Guard regulations, a crew member who is intoxicated while on duty is guilty of a crime under 33 C.F.R. § 95.055 (1993). Marine employers are prohibited from allowing an intoxicated individual to "stand watch or perform other duties," *id.* § 95.050(b), and must exercise "due diligence" to see that the regulations concerning intoxication are not violated, *id.* § 95.050(a). 11 F.3d at 1194-95. We emphasized the potentially disastrous environmental conse-

quences of an oil spill, and noted that statutes such as the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and the Oil Pollution Act of 1990, 33 U.S.C. § 2701 *et seq.*, evidence a Congressional policy of protecting the environment against oil spills in waters under federal jurisdiction. 11 F.3d at 1194. We also noted that Exxon faced potential civil and criminal liability if an impaired Exxon employee caused an accident. *Id.* at 1195. Consequently, we concluded that the federal policy favoring settlement of labor disputes by arbitration must yield to the "well defined and dominant policy that owners and operators of oil tankers should be permitted to discharge crew members who are found to be intoxicated while on duty." *Id.* at 1196.

It is in light of our two previous *Exxon* cases that articulate a strong public policy against the operation of oil tankers and common carriers by crew members who are under the influence of drugs or alcohol that we turn to the somewhat different fact posture presented by this appeal.

B.

Exxon argues that reinstatement of an employee who refuses to submit to a drug test upon a showing of reasonable cause violates the public policy identified in *Exxon I* and *Exxon II* because it undermines enforcement of the Coast Guard regulations and other laws animated by that policy. Exxon does not argue that Cash's refusal to take a drug test under these circumstances violated any positive law. In both *Exxon I* and *Exxon II* we acknowledged that another court of appeals had held that an arbitration award could be overturned only when its enforcement would cause a violation of positive law, *see Northwest Airlines, Inc. v. Air Line Pilots Ass'n Int'l*, 808 F.2d 76, 83-84 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1014, 108 S. Ct. 1751, 100 L.Ed.2d 213 (1988); *American Postal Workers Union v. United States Postal Serv.*, 789 F.2d 1, 8 (D.C. Cir. 1986), whereas others have opted for a broader approach that authorizes va-

cating an award that is "inconsistent with some significant public policy," *E.I. DuPont de Nemours & Co. v. Grasselli Employees Indep. Ass'n*, 790 F.2d 611, 616 (7th Cir.) (quoting Robert A. Gorman, *Basic Text on Labor Law* 597 (1976)), *cert. denied*, 479 U.S. 853, 107 S. Ct. 186, 93 L.Ed.2d 120 (1986); *see also United States Postal Serv. v. American Postal Workers Union*, 736 F.2d 822, 824 (1st Cir. 1984). In *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 108 S. Ct. 364, 98 L.Ed.2d 286 (1987), the Supreme Court considered the breadth of the public policy exception but declined to resolve this split.

In favoring the broader approach in *Exxon I*, we stated that "the distinction between an award which violates a manifestation of positive law and an award which is 'inconsistent with public policy' is often blurred." 993 F.2d at 363. We reasoned that "[w]here the 'positive law' is a stated purpose behind a statute or regulation, to thwart the purpose is to 'violate positive law.'" *Id.* at 364. In *Exxon II*, we clarified that in the earlier case we had "expressly rejected" the argument that an arbitration award may only be set aside when its enforcement would violate a specific "positive law." *Exxon II*, 11 F.3d at 1192. *Accord United Transp. Union Local 1589 v. Suburban Transit Corp.*, 51 F.3d 376, 381 (3d Cir. 1995).

The Union, although acknowledging that we opted for a broader reading of the public policy exception in *Exxon I* and *II*, argues that notwithstanding our broad language in those cases we cited to and relied on positive law. It notes that whereas reinstatement of the particular employees at issue in *Exxon I* and *II* would have violated specific Coast Guard regulations or placed Exxon in jeopardy of facing civil and criminal liability, there is no regulation or statute that punishes the refusal of an employee to submit to a drug test that is based on "reasonable cause." It differentiates the Coast Guard regulations that apply to post-accident testing, where the refusal to submit "could subject the individual to suspension and

revocation proceedings . . . and removal from any duties which directly affect the safety of the vessel's navigation or operations," 46 C.F.R. § 4.06-5(c) (1994), from those applicable to an employee who refuses to submit to reasonable cause drug testing, which only require the employer to enter the seaman's refusal in the vessel's official logbook, if such a book is required, *id.* § 16.250(d). Thus, the Union contends the regulations do not manifest a public policy that would prevent reinstatement of an employee who refuses to submit to a reasonable cause drug test.

The district court relied on this distinction to find that reinstatement of such an employee would not violate public policy. Exxon argues that in fact the Coast Guard regulations do provide the possibility of a more stringent sanction for refusal to undergo reasonable cause testing, but in our view of the issue we need not resolve that dispute. To the extent that the district court held that the parameters of public policy were limited by the extent to which the Coast Guard regulations impose a penalty, it misconstrued our holdings in *Exxon I* and *II*. In fact, in *Exxon I*, Foster's drug test was negative when evaluated at the Coast Guard screening level, and thus Coast Guard regulations did not require that his license be revoked. 993 F.2d at 358, 361. Nevertheless, we found that his reinstatement would violate the public policy underlying those regulations. *Id.* at 364.

A clearly defined and cautiously administered program of drug testing, whether based on random testing or reasonable cause, is the natural corollary to our earlier opinions identifying a strong public policy that precludes allowing intoxicated or drug-impaired seamen to remain in safety-sensitive positions aboard oil tankers. We noted in *Exxon II* that "the statutes and regulations . . . convey the unequivocal message that . . . an owner or operator [of an oil tanker] should take every practicable step to ensure that an intoxicated crew member does not cause or contribute to an oil spill." 11 F.3d at 1195. The right

to test employees for alcohol or drug use upon a showing of reasonable cause, on threat of discharge, is critical to achieving the objective of the Coast Guard regulations and of the environmental protection statutes we have cited. Were employees permitted to refuse to submit to such chemical tests, it is difficult to imagine why any drug user would consent.

The federal government has manifested its strong support for drug testing of employees involved in mass transportation through the promulgation by all federal agencies governing mass transportation of regulations designed to prevent drug use by employees in safety-sensitive positions. Such regulations in most instances equate refusal to test with a "positive" test result. *See, e.g.*, 14 C.F.R. § 121.455(c) (1995) (Federal Aviation Administration); 49 C.F.R. §§ 219.213, 219.505, 219.603(b) & (c) (1994) (Federal Railroad Administration); 49 C.F.R. § 391.95(d) (1994) (Federal Highway Administration); 49 C.F.R. § 653.35(a) (1994) (Federal Transit Administration); 10 C.F.R. § 26.27(c) (1994) (Nuclear Regulatory Commission).

The force of our decisions in *Exxon I* and *II* would be radically undermined if we declined to take the logical next step and decide that reinstatement of an employee who refused to submit to a drug test upon a showing of reasonable cause violates public policy. Although Coast Guard regulations do not mandate discharge for an employee—even one in a safety-sensitive position—who refuses a drug test, we conclude that if Exxon had cause to require a test, Cash's reinstatement following his refusal would violate public policy because it would undercut enforcement of Coast Guard regulations and environmental statutes which denote a well defined and dominant public policy against permitting intoxicated crew members to operate oil tankers and other common carriers. *Cf. Local No. P-1236, Amalgamated Meat Cutters & Butcher Workmen v. Jones Dairy Farm*, 680 F.2d 1142, 1145 (7th Cir. 1982) (company rule forbidding employees

from reporting health violations violated public policy because it hindered accomplishment of the goals of the Meat Inspection Act).

C.

Exxon recognized that under its collective bargaining agreement, the Union was entitled to grieve whether there was reasonable cause to require Cash to submit to a drug test. The Chairman found that Exxon lacked "cause" to require Cash to submit to a drug test, but that Cash was "insubordinate" for refusing to take the test. However, because discharge for insubordination was not mandated by the company policy, the Chairman determined that discharge was too harsh a sanction, and the panel ordered Cash reinstated without back pay.

In considering Exxon's challenge to the arbitral award, we do not review for legal error, but are limited to assessing whether the award "draw[s] its essence from the collective bargaining agreement." *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766, 103 S. Ct. 2177, 2183, 76 L.Ed.2d 298 (1983). This standard is satisfied " 'if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award.' " *Super Tire Engineering Co. v. Teamsters Local Union No. 676*, 721 F.2d 121, 124 (3d Cir. 1983) (quoting *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1128 (3d Cir. 1969)), *cert. denied*, 469 U.S. 817, 105 S. Ct. 83, 83 L.Ed.2d 31 (1984). *See also News America Publications, Inc. v. Newark Typographical Union, Local 103*, 918 F.2d 21, 24 (3d Cir. 1990) ("A court may not overrule an arbitrator simply because it disagrees with the arbitrator's construction of the contract or because it believes its interpretation of the contract is better than that of the arbitrator." (citation omitted)).

Exxon argues that we should set aside the award because the arbitrator exceeded his authority in reinstating Cash to his former position. In reviewing Exxon's multifaceted challenge to the arbitral decision we may not "second-guess[] the arbitrator's fact-finding, particularly insofar as the conclusion that the asserted public policy would be violated by the employee's reinstatement depends on drawing factual inferences not made by the arbitrator." *United States Postal Service v. National Ass'n of Letter Carriers,* 839 F.2d 146, 148 (3d Cir. 1988).

1. *The Cause Requirement*

Exxon argues that in interpreting the company drug policy's requirement that "cause" support a drug test, the Chairman impermissibly inserted a "clear and convincing" evidence of ownership standard, and employed an "ex post" analysis to assess whether cause existed. The Union responds that the quantum of proof required in such cases is unsettled, but that where the offense charged is one that is punishable by law, such as drug possession, arbitrators have commonly held employers to a "clear and convincing" or "beyond a reasonable doubt standard." Brief of Appellee at 35 (citing Frank Elkhouri & Edna Asper Elkouri, *How Arbitration Works* 661-63 (4th ed. 1985)). It further maintains that neither the parties' contract nor the company's Drug and Alcohol Policy defined "cause," identified a standard of proof to be employed, or specified at what point in time "cause" must exist; therefore, these determinations were within the province of the arbitrator.

We agree. The parties bargained for an arbitrator to interpret their contract. The Exxon Drug and Alcohol Policy states: "[t]he Company . . . has the right to require employees to submit to medical evaluation or alcohol and drug testing *where cause exists* to suspect alcohol or drug misuse." App. at 44 (emphasis added). The term "cause" is ambiguous. Where a contractual ambiguity exists it is within the province of the arbitrator to interpret the ambiguous phrase. *Suburban Transit*

Corp., 51 F.3d at 380-81. Although the Chairman's opinion may not be a model of clarity, it is evident that he ultimately concluded that Exxon lacked "cause" to require Cash to submit to a drug test. That Exxon now disagrees with that conclusion is not a ground for vacating his decision. Exxon could have defined "cause" more specifically in its policy, or could have bargained with the union to remove cases arising under its drug policy from the jurisdiction of arbitrators altogether. It did not, and therefore may not now be heard to complain that the arbitrator lacked authority to make determinations that the company policy and the parties' agreement left open for an arbitrator's judgment.

2. *Change of Discipline*

Exxon next argues that the arbitrator lacked authority to reinstate Cash because the company's September 28, 1988 letter clearly notified employees that termination was the penalty for violation of the Drug and Alcohol Policy. But the Drug Policy requires only that employees submit to testing "where cause exists." The arbitrator concluded that it did not; accordingly, based on his findings, the arbitrator did not exceed his authority.

Exxon further maintains that the arbitrator lacked authority to change the discipline for a finding of insubordination, and in doing so exceeded his power to interpret the contract. The arbitrator found that Cash's refusal to take the drug test was insubordinate. Although company rules permit Exxon to discharge an employee for insubordination, the arbitrator believed that under these circumstances a discharge would conflict with the requirement that "cause" support an order to take a drug test.

This situation is analogous to the one we faced in *Super Tire*, 721 F.2d 121. In that case, drinking alcohol during work hours was characterized in the parties' contract as a cause for "immediate dismissal." *Id.* at 122. Yet dismissal also required "just cause." *Id.* The arbitrator

determined that although the employee had been drinking during work hours, dismissal was too harsh a punishment because the employee had not been warned that the company would strictly enforce its policy. We reversed the district court's order vacating the arbitrator's determination because we concluded that the terms of the contract were not so clear as to foreclose the arbitrator's interpretation that a warning was required. *Id.* at 125.

In *Super Tire*, we relied on our earlier decision in *Arco-Polymers, Inc. v. Local 874*, 671 F.2d 752 (3d. Cir.), *cert. denied*, 459 U.S. 828, 103 S. Ct. 63, 74 L.Ed.2d 65 (1982). There, a clause in the employment contract provided for discharge of employees absent from work for four consecutive days without good cause. Another section provided that employees shall be discharged only for "just cause." *Id.* at 753. The arbitrator reinstated an employee who had been terminated for being absent from kork for 19 days without good cause. The district court vacated the award. We held that the district court erred because "[i]t cannot be said with absolute certainty . . . that discharge under this section is 'strictly a function of management.'" *Id.* at 756 (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584, 80 S. Ct. 1347, 1354, 4 L.Ed.2d 1409 (1960)).

Similarly here, the Agreement stated that insubordination "shall constitute cause for which unlicensed personnel *may* be discharged." App. at 147 (emphasis added). The subsequent September 1988 letter warned that the company's Drug and Alcohol Policy would be strictly enforced. The policy included the provision that employees must submit to drug testing "where cause exists." App. at 44. The Chairman found that reading these provisions together, the "just cause" standard still applied, and because Exxon lacked cause to test Cash, discharge for insubordination would be inappropriate. As in *Super Tire* and *Arco*, we cannot say that the arbitrator's read-

ing of the contract is implausible and that his decision to reinstate Cash was beyond the bounds of his authority.

3. *Interpretation of Coast Guard Regulations*

Exxon also contends that the arbitrator exceeded his authority by interpreting Coast Guard regulations, because an arbitrator's decision must be based exclusively on the collective bargaining agreement. In light of the fact that the Chairman based his decision on the terms of the collective bargaining agreement, even though he referred to the Coast Guard regulations, *see* App. at 93, we have no occasion to consider whether, as Exxon claims, the Chairman interpreted the regulations incorrectly.

4. *Reasonableness of Arbitrator's Findings*

Finally, we consider whether the Chairman's finding in this case that Exxon lacked "cause" to order Cash to take a drug test was so unreasonable that it would violate public policy to enforce his award. The Chairman found that there was marijuana or marijuana residue in numerous places in the cabin Cash was using. Specifically, there was green leafy material in a desk and cabinet, ash on the rug, seeds under the rug, and two butts of marijuana, referred to as "roaches," in a suitcase pouch. The Union emphasized Cash's minimal association with that room, in that Cash had been assigned there less than two days before and had spent only a few hours there because he was working long shifts elsewhere on the ship.

At oral argument, Exxon argued that where, as here, a matter of public policy is involved, the arbitrator's findings should be held to a higher standard of scrutiny and set aside if unreasonable. We find no authority for vacating an arbitral award on such grounds. On the contrary, an arbitrator's decision need be neither wise nor internally consistent. In fact, arbitrators have no obligation to explain their reasons for an award or even to write an opinion unless the contract so requires. *Virgin Islands Nurs-*

ing Association's Bargaining Unit v. Schneider, 668 F.2d 221 (3d Cir. 1981); *see also United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598, 80 S. Ct. 1358, 1361-62, 4 L.Ed.2d 1424 (1960). Arbitrators' decisions are subject to a standard of only "minimal rationality." *Virgin Islands Nursing*, 668 F.2d at 223 (quoting Robert A. Gorman, *Basic Text on Labor Law* 586 (1976)). Although we will vacate an award if we find that the award itself violates public policy, the public policy exception does not lessen our deference to an arbitrator's factual findings.

The Supreme Court has made clear that findings of fact and inferences to be drawn therefrom are the exclusive province of the arbitrator. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36, 44, 108 S. Ct. 364, 369-70, 374, 98 L.Ed.2d 286 (1987). That a court "is inquiring into a possible violation of public policy [does not] excuse a court for doing the arbitrator's task." *Id.* at 45. Thus, this court may not refuse enforcement even if we consider the evidence sufficient to prove that reasonable cause existed to require Cash to submit to a drug test. Exxon challenges the reasonableness of the arbitrator's conclusions, but "[n]o dishonesty is alleged; only improvident, even silly, factfinding is claimed." *Id.* at 39, 108 S. Ct. at 371.

It is not our role to draw inferences that the factfinder did not. We therefore will not disturb the arbitrator's finding that "cause" did not exist to require Cash to submit to a drug test. Accordingly, because we accept the arbitrator's finding that Cash was ordered to submit to a test without reasonable cause, his reinstatement does not offend public policy and the decision of the arbitrator must be enforced.

III.

For the foregoing reasons, the order of the district court will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5027

EXXON SHIPPING COMPANY,
Appellant

v.

EXXON SEAMAN'S UNION

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 93-cv-00689)

Present: Sloviter, *Chief Judge*, Alito *Circuit Judge*, and Rendell, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel September 11, 1995.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered on December 12, 1994, be, and the same is hereby affirmed. Costs taxed against appellant.

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* Hon. Marjorie O. Rendell, U.S. District Judge for Eastern District of Pennsylvania, sitting by designation.

All of the above in accordance with the opinion of this Court.

Dated: January 11, 1996

Attest:

/s/ P. Douglas Sisk
Clerk

[Filed Dec. 8, 1994]

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Chambers of
NICHOLAS H. POLITAN
Judge

NOT FOR PUBLICATION

December 8, 1994

LETTER OPINION
ORIGINAL ON FILE WITH CLERK OF THE COURT

Re: Exxon Shipping Company
v. Exxon Seamen's Union
Civil Action No. 93-698 (NHP)

Dear Counsel:

This matter comes before the Court on a motion of defendant Exxon Seamen's Union for summary judgment pursuant to Fed.R.Civ.P. 56 to confirm and enforce an arbitration award. Plaintiff Exxon Shipping Company opposes the motion, and cross-moves for summary judgment to vacate the arbitration award. For the reasons stated herein, defendant's motion for summary judgment is GRANTED, and plaintiff's cross-motion for summary judgment is DENIED.

STATEMENT OF FACTS [1]

Exxon Shipping Company ("Exxon") operates American Flag ships and other vessels on the high seas and on

[1] The Court's recitation of the facts of the dispute is derived from the Opinion of the Neutral Chairman of the Arbitration Board dated November 27, 1992.

the inland waterways of the United States. Exxon Seamen's Union ("Union") is the sole and exclusive collective bargaining representative of all unlicensed personnel employed by Exxon in the deck department, the engine department, and the steward's department on-board Exxon's vessels. Exxon and the Union were parties to a collective bargaining agreement ("CBA") that had an effective date of July 31, 1985, and which was to expire on August 31, 1987. Prior to and after the expiration of the 1985-87 CBA, the parties negotiated for a successor agreement. On March 29, 1988, Exxon declared an impasse in negotiations, and advised the Union and its members that Exxon's final proposals would be implemented effective April 1, 1988. All the terms of the 1985-87 CBA that were not part of the negotiations were to be continued in full force and effect.

At all times after April 1, 1988, the discipline clause from the 1985-87 CBA was in effect. The clause indicated that an employee could be discharged only for "cause". The terms and conditions that were implemented effective April 1, 1988 also contained a grievance and arbitration provision. The provision provided for a two-step process culminating in arbitration before an Arbitration Board, composed of one representative of Exxon, one representative of the Union, and a neutral arbitrator sitting as chairperson.

The grievant in this case is Alan B. Cash ("Cash"). Cash was employed by Exxon for approximately thirteen years. He started with Exxon as a seaman and worked his way up to chief pumpman. It is agreed by the parties that the responsibilities of a chief pumpman include moving cargo on and off ships and properly aligning pumps for the transfer of products. On or about May 10, 1989, Cash was assigned to the oil tanker Exxon Washington, anchored in San Francisco Bay. Prior to that date Cash was stationed on the ship Exxon Benicia in Japan. For the period of May 10-15, 1989, Cash was

quartered in the second pumpman's room on the Exxon Washington.

On May 15, 1989, the chief pumpman of the Exxon Wash[illegible]on left the ship on a family emergency. That day, Cash was assigned to the chief pumpman's room. The room was not cleaned before it was occupied by Cash. For fire safety reasons, all rooms on the Exxon Washington were left unlocked and were accessible to cleaning personnel and members of the crew. Accordingly, Cash ordinarily left his cabin door unlocked. During May 15-17, 1989, Cash worked almost around the clock.

On May 17, 1989, Exxon conducted an unannounced drug search of the Exxon Washington. All the rooms of the ship were searched. During the search of the chief pumpman's room—then Cash's quarters—the search team and their dogs discovered portions of a marijuana plant in a desk drawer, marijuana ash by the bed post, several marijuana seeds under the carpeting, and two marijuana cigarette butts, or "roaches", in the pouch of a suitcase.

As a result of the search, Exxon requested that Cash take a drug test. Cash refused, and was subsequently discharged. By letter dated June 6, 1989, Exxon advised Cash that he was terminated for violations of Exxon's policy on alcohol and drug use; that he was in possession of illegal substances; and that he refused to submit to a drug test. The Union filed a grievance to protest Cash's discharge. When the parties were unable to resolve the grievance informally, the dispute was submitted to arbitration before an Arbitration Board ("Board"). During these proceedings, Cash's testimony regarding the luggage, in which the marijuana roaches were discovered, varied. First, Cash stated that the luggage was a gift from his wife. Later, Cash asserted that the luggage was not his, but rather that he took it from a store room on his previous ship without inspecting it first. Furthermore, Cash testified that he did not clean the chief pumpman's room before occupying it or any time thereafter.

In an Opinion and Award dated November 27, 1992, the Board found that Exxon did not have "cause" to discharge Cash, and ordered him reinstated without back pay.[2] The Board ruled as follows:

> . . . in absence of any drugs in grievant's previous room, the probabilities are greater that Mr. Cash did not introduce the marijuana into his cabin prior to the search of May 17, 1989 than that he did.
>
> If there was no reasonable cause to conclude that grievant brought the drug into the cabin—and the above analysis finds that there was not—then the Coast Guard regulations would not call for a drug test, and no violation of the regulations could be said to exist. The question of whether there was cause under the company policy will be considered below.
>
> The matter of the suit case is the weakest point of Mr. Cash's defense against the charge that he violated company policy by introducing marijuana into his cabin. (Even in light of this, the higher Coast Guard standard of "reasonable cause" could not be met because of a) previous occupancy of the room, b) lack of drugs in grievant's previous room, and c) the other considerations discussed above. The lower company standard conceivably might have been met by the suitcase materials.)
>
> Mr. Cash was either incorrect when he told the PRC that his wife purchased the suitcase for him or when he testified at the arbitration that he acquired the suitcase on the Exxon Benicia. Since no doubt has been cast on his assertion that when he got the piece it was used, that weakness of testimony may make no difference. The undiscovered cigarette ends

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[2] The decision not to award back pay was based on the Board's finding that Cash had been insubordinate in refusing to take a drug test. The Opinion stated that the "grievant violated the fundamental rule that except when an order imperils health or safety, employees must first obey an order and then grieve."

could have been in the pouch no matter how the bag was obtained . . . .

Still, there is doubt how the "roaches" got in the bag. No inference can be drawn from the presence of the other marijuana in the searched room that grievant put the "roaches" in the bag. The chairman has found that there is considerable doubt Mr. Cash brought the other drug traces into the cabin. The most that can be said about the butts in the bag is that they would be strongly suspicious in the absence of the contrary circumstantial evidence about the other materials found . . . .

We must come to an *ex post* conclusion about whether there was cause to order a drug test. On May 17, 1989, in light of what Mr. Newman and his cohorts found, "cause" *did* exist. (That will create problems about grievant's refusal to take the test even if the above discussion raises question[s] concerning the basis for the test order.) The instant review of the findings concludes, however, that even though drug material was discovered in grievant's cabin, sufficient question was raised about ownership of the drugs so that "cause," "reasonable cause," "probable cause" or "just cause" did not exist to order a test. And Mr. Shearer's testimony established that Mr. Cash's appearance and actions provided no basis for ordering a test.

The chairman concludes that if Mr. Cash had taken the demanded drug test and then had grieved, a later arbitration would have found that lack of "cause," "reasonable cause," "probable cause," or "just cause" to have ordered a test on the basis of what was found in the cabin would have led to reversal of any discipline based on [the] test results.

[In light of this finding, the chairman ruled that] . . . grievant violated the fundamental rule that

> except when an order imperils health or safety, employees must first obey an order and then grieve . . . .

Opinion of Arbitration Board (Nov. 27, 1992). As a result of these findings, the Board's award reinstated Cash without back pay.

On February 18, 1993, Exxon filed suit against the Union in the United States District Court, District of New Jersey, arguing that the award violated well defined and dominant public policy, and that the Board exceeded its authority. The Union now moves for summary judgment pursuant to Fed.R.Civ.P. 56 to confirm and enforce the arbitration award. Simultaneously, Exxon cross-moves for summary judgment to vacate the award.

DISCUSSION

A. Standard of Review for Summary Judgment Motions

Under Fed.R.Civ.P. 56, summary judgment may only be granted if, drawing all inferences in favor of the non-moving party, there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *See Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir.), *cert. dismissed*, 483 U.S. 1052 (1987). The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). If this burden is satisfied, the non-moving party is saddled with the obligation of identifying specific facts which illustrate that there is a genuine issue for trial. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

In the case at bar, the arbitrator's findings of facts may not be disturbed. The question of whether there are grounds to vacate an arbitration award is a question of law. Accordingly, this matter is appropriately resolved on motion for summary judgment pursuant to Fed.R.Civ. P. 56.

B. Standard of Review for Arbitration Awards

According to well settled law, courts have only a limited power to review a labor arbitration award instituted pursuant to a collective bargaining agreement. *Stroehmann Bakeries, Inc. v. Local 776, Int'l Brotherhood of Teamsters*, 969 F.2d 1436, 1441 (3d Cir.), *cert. denied*, —— U.S. ——, 113 S. Ct. 660 (1992). "The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987), quoting *United Steelworkers of Amer. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). "As long as the arbitration award 'draws its essence from the collective bargaining agreement,' " and is not the arbitrator's own brand of justice, a court may not vacate the award. *Id.*, quoting *Steelworkers*, 363 U.S. at 597. This is true even if the court finds the basis for the award to be ambiguous or disagrees with the board's findings, contract interpretations, or choice of remedies. *Id.* at 36-[3]8. "A reviewing court is 'bound—under all except the most limited circumstances—to defer to the decision of the arbitrator, even if that decision finds the facts and states the law erroneously.' " *Phoenix Newspapers, Inc. v. Phoenix Mailers Union Local 752*, 989 F.2d 1077, 1080 (9th Cir. 1993); *see also Exxon Shipping Co. v. Exxon Seamen's Union*, 801 F. Supp. 1379, 1384 (D.N.J. 1992) (citation omitted) ("Fris"). Accordingly, this Court begins its analysis with the presumption that the Board's award is valid.

C. The Public Policy Exception

The Supreme Court has recognized a narrow exception to the general unwillingness to tamper with arbitrators' awards in labor contexts. *See Misco*, 484 U.S. at 43, relying on *W.R. Grace & Co. v. Local 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 766 (1983).

A court may refuse to enforce an arbitrator's award where it would violate an explicit, well defined and dominant public policy which is ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Id.*, quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945). The public policy exception is triggered when enforcement of an arbitration award would compel one party to take action which conflicts with a well defined and dominant public policy. *Brown v. Ruascher Pierce Refsnes, Inc.*, 994 F.2d 775, 782 (11th Cir. 1993) (citation omitted). "[T]he critical inquiry is not whether the underlying act for which the employee was disciplined violates public policy, but rather whether there is a public policy barring *reinstatement* of an individual who committed the wrongful act." *Stead Motors v. Automotive Machinists Lodge No. 1173*, 886 F.2d 1200, 1215 (9th Cir. 1989) (*en banc*) (emphasis in original), *cert. denied*, 495 U.S. 946 (1990), citing *W.R. Grace*, 461 U.S. at 766; *see also Monroe Auto Equip. Co. v. International Union*, 981 F.2d 261, 269 (6th Cir. 1992) (citation omitted), *cert. denied*, —— U.S. ——, 113 S. Ct. 2396, *reh'g denied*, —— U.S. ——, 113 S. Ct. 3066 (1993).

While notions of public policy are to be ascertained by reference to positive law and not from general considerations of the public interest, the Third Circuit has nevertheless adopted an expansive view of what constitutes positive law. *See Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357, 364 (3d Cir. 1993) ("*Foster*"). In *Foster*, the Third Circuit ruled that "the contours of positive law are broad enough to include not just specific rules or prohibitions but also the stated purposes behind these rules or prohibitions." *Id.*

In the matter presently before the Court, Exxon submits that reinstating Cash to his former position would conflict with a well defined and dominant public policy of continuing employment of a person who refuses to

submit to a drug test.[3] Exxon asserts that this public policy is embodied in two sources. The first is the drug and alcohol policy promulgated by Exxon.[4] Exxon's policy, however, did not mandate that employees who refused to submit to drug tests be discharged. Exxon's policy, reflected in its letter dated March 29, 1988, only stated that dismissal was a possibility. Therefore, in contrast to Exxon's assertion that the Board ignored the CBA, the Board followed Exxon's policy by denying Cash back pay.

The second source of public policy upon which Exxon relies is the United States Coast Guard ("USCG") regulations. *See* 46 C.F.R. § 16. Exxon asserts that the USCG regulations demand that a seaman's refusal to be tested equates to a positive test result. *See* 46 C.F.R. § 16.250. The USCG regulations establish pre-employment, random, post-accident, and reasonable cause testing requirements. However, the only penalty provisions providing for discharge are found in the USCG regulations governing post-accident testing, *see* 46 C.F.R. §§ 4.06-05, 4.06-10, and where a crew person tests positive for an illegal substance, *see* 46 C.F.R. § 16.201(c).

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[3] Exxon points to cases, from this and other circuits, where courts have declined to enforce arbitration awards that reinstated employees discharged for being impaired on the job. In this case, however, it was never alleged that Cash was under the influence of a controlled substance. In fact, the Board determined that there was no reasonable cause to even conclude that Cash was in possession of marijuana.

[4] Exxon's policy provides:

> The Company also has the right to require employees to submit to medical evaluation or alcohol and drug testing where cause exists to suspect alcohol or drug misuse. A positive test result or *refusal to submit to a drug test is grounds for disciplinary action, including dismissal.*

Letter from Exxon to the Union and its members, dated March 29, 1988 (emphasis added).

In contrast, under the USCG regulations for reasonable cause testing,[5] the only penalty provided for when the individual refuses to submit to the test is that his or her name is entered into the vessel's official log book. 46 C.F.R. § 16.205(d). Therefore, Exxon's reliance on the USCG regulations for the argument that a well defined and dominant public policy precludes the reinstatement of Cash is misplaced.

D. Arbitration Board Did Not Exceed Its Authority

Finally, Exxon asserts that the Board's award must be vacated because it does not draw its essence from the CBA. Exxon argues that the Board, in reaching its decision, exceeded its authority by interpreting certain USCG regulations, rather than the CBA. The Union contends that the Board did not exceed its authority by ordering that the grievant be reinstated without back pay.

A federal court "may only set aside an arbitrator's award interpreting a CBA when the interpretation cannot be said to be in any rational way derived from the agreement." *Teamsters Union Local No. 115 v. DeSoto, Inc.*, 725 F.2d 931, 934 (3d Cir. 1984); *see also Super Tire Engineering Co. v. Teamster Local Union No. 676*, 721 F.2d 121, 123-24 (3d Cir. 1983), *cert. denied*, 469 U.S. 817 (1984). Additionally, a highly deferential standard of review is extended to the arbitrator's substantive decision as to what constitutes reasonable cause for discharge. *Interstate Brands Corp. v. Chauffeurs*, 909 F.2d 885, 889 (6th Cir. 1990) (citation omitted), *cert.*

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[5] The USCG regulations governing reasonable cause testing provide that an employer may only order a crew person for a drug test based upon a "reasonable and articulate belief that the individual has used a dangerous drug based upon direct observation of specific, contemporaneous, physical, behavioral or performance indicators of probable use." *See* 46 C.F.R. § 16.250(b). In the present case, the Board determined that reasonable cause did not exist under the USCG regulations to order Cash to submit to a drug test.

denied, 499 U.S. 905 (1991). "In the absence of an unambiguous provision in the agreement mandating dismissal . . ., [the court] will not set aside an arbitrator's decision to review a dismissal in light of the mix of factors that make up just cause." *Super Tire*, 721 F.2d at 125.

In the instant case, the parties bargained for an arbitrator to tell them what was "just cause" for discharge and what was not. The Board gave full consideration to the parties' agreements and interpreted the meaning of the combined agreements. Pursuant to its authority, the Board fashioned a remedy in accordance with the jurisdiction with which it was vested. Accordingly, the Board did not exceed its authority when it determined that in this case, just cause did not exist to discharge Cash.

In consenting to the Arbitration Board's jurisdiction over this dispute, Exxon agreed to have the Board interpret the collective bargaining agreement and to fashion an appropriate remedy. The Board construed the agreement and, upon due deliberation, found that Cash's discharge was improper. In ordering Cash reinstated without back pay, the Board fashioned an appropriate remedy. Furthermore, the Board's award does not violate any well defined or dominant public policy.

CONCLUSION

For the foregoing reasons, the summary judgment motion of defendant Exxon Seamen's Union is GRANTED, and the cross-motion for summary judgment of plaintiff Exxon Shipping Company is DENIED.

An appropriate Order accompanies this Opinion.

/s/ Nicholas H. Politan
NICHOLAS H. POLITAN
U.S.D.J.

[Filed Dec. 8, 1994]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 93-689

HON. NICHOLAS H. POLITAN

EXXON SHIPPING COMPANY,
a Delaware Company,
Plaintiff,

v.

EXXON SEAMEN'S UNION,
Defendant.

ORDER

This matter having come before the Court on a motion of defendant Exxon Seamen's Union for summary judgment pursuant to Fed.R.Civ.P. 56 to confirm and enforce an arbitration award, and the cross-motion for summary judgment pursuant to Fed.R.Civ.P. 56 of plaintiff Exxon Shipping Company to vacate the arbitration award, and the Court having considered the matter and the submissions of the parties, and for the reasons appearing more particularly in the Letter Opinion of this Court; and good cause having been shown.

IT IS on this 8th day of December, 1994,

ORDERED that the motion of defendant Exxon Seamen's Union is GRANTED, and the cross-motion of plaintiff Exxon Shipping Company is DENIED, and the Complaint is hereby DISMISSED.

/s/ Nicholas H. Politan
NICHOLAS H. POLITAN
U.S.D.J.

[Entered on Docket 12-12-94]

APPENDIX C

IN THE MATTER OF THE ARBITRATION BETWEEN
EXXON SEAMEN'S UNION

and

EXXON SHIPPING COMPANY

TERMINATION OF ALAN B. CASH

Opinion of
Neutral Chairman
Award of Panel

Panel of Arbitrators:

Maurice C. Benewitz, Neutral Chairman
William P. Hoeler, Company Appointed Arbitrator
Howard A. Goldberger, Esq., Union Appointed Arbitrator

Appearances

For the Union: Howard A. Goldberger, Esq., Counsel

For the Company: Albert R. Galik, Esq., Counsel

Three hearings were held by the panel of arbitrators on July 16, 1991, January 22, 1992 and April 16, 1992 at Newark, New Jersey to hear and consider a controversy concerning the termination of Pumpman Alan B. Cash. The parties were unable to agree on a submission. After full consideration of the testimony, evidence and argument, the chairman concludes that the usual language for a disciplinary discharge fairly would allow both parties to present their evidence and submit their arguments. Therefore, he finds and rules that the issue presented should read:

> Was the discharge of Alan Cash for just cause? If not, what shall be the remedy?

In such a disciplinary proceeding, the burden lies upon the employer who effected the discharge.

The hearings were transcribed. Briefs were submitted by the parties. After the chairman had read the briefs and reviewed the record, he held a telephonic conference call with the other members of the panel. Thereafter, the proceedings were closed and the instant opinion and award was written.

The opinion is solely that of the chairman. The award is that of the chairman and of those members of the arbitration panel who sign as concurring.

The Contract

At the time this grievance arose, the collective bargaining agreement dated effective July 31, 1985 (Ex. J-1) had expired. On March 29, 1989, the company declared an impasse in bargaining for a successor contract (Ex. C-1). Management stated that its final offer, with certain exceptions, would be implemented on April 1, 1988. Some amendments to continuing provisions in the expired contract also appeared.

The Policy Statement

Included with the promulgated materials was a policy statement on drug and alcohol abuse. The first paragraph read as follows (emphasis applied by chairman):

> Exxon Shipping Company is committed to a safe, healthy, and productive work place for all employees. The Company recognizes that alcohol, drug, or other substance abuse by a few employees will impair their ability to perform properly and can have serious adverse effects on the safety, efficiency, and productivity of other employees and the Company as a whole. *The misuse of legitimate drugs or the use,*

> *possession, distribution, or sale of illicit or unprescribed controlled drugs on Company business or premises is strictly prohibited and is grounds for termination.* Possession, use, distribution, or sale of alcoholic beverages on Company premises is not allowed without prior approval of appropriate senior management. *Being unfit for work because of use of drugs, or alcohol is strictly prohibited and is grounds for termination of employment.* While this policy refers specifically to alcohol and drugs, it is intended to apply to all forms of substance abuse.

The fourth paragraph read (emphasis applied by chairman):

> Exxon Shipping Company may from time to time conduct unannounced searches for drugs and alcohol on owned or controlled property. The Company also has the right to require employees to submit to medical evaluation or alcohol and drug testing *where cause exists to suspect* alcohol or drug misuse. A positive test result or refusal to submit to a drug test *is grounds for disciplinary action, including dismissal.*

The material also included guidelines for application of the policy by masters, captains, managers and supervisors. The first 2 paragraphs read (emphasis applied by chairman):

> 1. At the discretion of the President or Fleet Manager, the Company *may conduct unannounced alcohol and drug searches on owned or controlled property* where there is *reasonable cause to suspect that these substances may be present.* Reasonable cause may include searches in operations where use of these substances could create an unsafe situation.

2. The decision to require an employee to submit to testing for drugs and alcohol requires the advance endorsement of the Human Resources Manager. Prior to any testing, the employee must sign an Informed Consent form. In cases where a medical evaluation is deemed appropriate, medical personnel should be asked to collect a urine and/or blood sample for testing to determine the presence of alcohol and/or drug. Blood tests will not be taken on board ship by vessel personnel. If circumstances prevent medical evaluation from being conducted soon after the "for cause" incident, the Management may collect and properly process the urine sample.

Thereafter, in compliance with an opinion and award of Arbitrator Daniel F. Brent (AAA Case No. 18 30 0062 85N) the company on September 27, 1988 issued a notice to all employees (Ex. C-4). The writing reiterated the policy and guidelines noted above. The writing cited Coast Guard regulations prohibiting operation of a vessel while intoxicated. The company gave further notice that

> violation of the Company Alcohol and Drug Use Policies, or regulations governing alcohol or drug use in the work place will result in immediate termination from the vessel . . . *termination of employment* is the penalty for violation of these standards.

[The union, until after the events involving Mr. Cash, did not concede that the company had the power to issue and enforce this policy in its various forms. The union officials advised the members not to take drug tests when ordered to do so by company officials. Such advice was given to the grievant, Mr. Cash. These matters will be considered below.]

Prior Awards

In addition to the Brent award cited in the September 27, 1988 document discussed above, the parties submitted 4 other awards dealing with alleged drug or alcoholic problems. For reasons which will be discussed below, the awards of panels chaired by Arbitrators Herbert L. Marx, Jr., David N. Stein, and Martin F. Sheinman are inapposite. The dispute before Arbitrator Joan Parker had many resemblances to that here at issue. So the Parker award will have to be considered carefully.

The grievant in the case before the Marx panel was found to have been impaired by alcohol. This was an announced reason for termination of employment, the panel ruled. The grievant in the instant matter, Mr. Cash, was not charged with being under the influence of either alcohol or drugs and so the Marx award is not really applicable. Nor can the arbitrator substitute his judgment where rules and penalties are posted.

The award does make several statements which may have some relevance. The award finds that while the drug and alcohol policy refers to testing, the policy "leaves the option for such testing to the Company." The Coast Guard regulations allow the ship's master to rely on observation or on a chemical test at his option.

The grievant in the case decided by the Stein panel had, in June 1988, completed an inpatient program treating cocaine addiction. This occurred under the company's confidential counselling program. The grievant then was assigned to a ship and was suspended 6 months later for failure to report to duty for circumstances not beyond his control. The drug and alcoholism program was reviewed with the grievant.

The grievant was expected to report for assignment on April 20th after another assignment and leave. But he was directed to report to the company earlier because his wife had called in to say she believed he was involved

with drugs. The reason given to grievant for calling him in was to discuss his next assignment. When he reported, he was asked to take drug and alcohol tests and agreed to do so. At the time of the tests, grievant admitted using drugs and the tests so demonstrated. After consideration, grievant was discharged.

The company contended that under its policy, a test could be administered for "cause" rather than for "probable cause" or "reasonable cause," *i.e.*, for a "reasonable suspension."

Arbitrator Stein found that under Paragraph 1 of the Guidelines for implementation of its policy, the company had committed itself to a reasonable cause standard for searches or for testing of individuals. The words "for cause" in Paragraph 2 were found to refer back to the words in Paragraph 1.

Furthermore, the Coast Guard documents cited by the company, refer to "reasonable cause." Whatever the standard, it was ruled, the company lacked it. The medical information was privileged and should not have been used. The wife's information was unreliable. Nor had the grievant used drugs on company property, it was found. For all these reasons, the arbitrator ruled that the positive drug test results should be suppressed. Thus there was no just cause for the discharge. The issue of back pay was remanded with the arbitrator retaining jurisdiction.

The situation at issue was insufficiently similar to that involving Mr. Cash for the Stein award to be of assistance in the instant matter. Mr. Cash was not charged with using or being under the influence of alcohol or drugs.

In the dispute before the Scheinman panel, cause property was found to test the grievant; and he tested positive for marijuana although there was question whether he ingested it on company property. The facts again were

strongly differentiated from those concerning Mr. Cash who never was found to have used marijuana.

Dr. Parker considered 2 discharges for alleged violation of company Rule 14 which prohibited introduction, possession or use on company property of alcohol or illegal drugs. Two ships were searched by contractors using detection dog.

In the room of one grievant, a homemade pipe containing marijuana was found. The room of the other grievant contained a hand-rolled cigarette butt and an alligator clip which both tested positive for marijuana.

Both grievants denied that the discovered materials belonged to them. Individuals had been admitted into the locked room of one grievant to measure for new carpeting. The second grievant had lived in the room for only 8 days between September 20th and October 26th because the room was being renovated. Since this grievant had been worked 12 to 16 hours after moving in, he allegedly had been unable to clean the room. He did find and keep the alligator clip which had been present when he moved into the room. The union noted that the rooms had been occupied by employees who were on leave and who had left their belongings. In addition, workers had been in the rooms to renovate them. The doors of the rooms often were not locked. One of the grievants refused on union advice to take a drug test.

Dr. Parker ruled on two aspects of this dispute. One concerned the validity of the drug and alcohol policy and the method of enforcing it. Since that issue was not raised in the Cash arbitration, the instant chairman will not consider that portion of the Parker award.

Dr. Parker ruled on the "central issue" of

> the grievants' "actual" or "constructive" possession of the marijuana discovered in their rooms.

An employee may be held responsible for marijuana found in his room if he had reason to know that others

might have left the marijuana there, the arbitrator ruled. But there would be no violation of the company rule for the same employee if someone placed the drug in the room without his knowledge. In cases based on circumstantial evidence only, that evidence "must lead to one and only one logical conclusion," Dr. Parker wrote.

Due to rules on fire safety, room doors are left unlocked. Many different persons worked in the rooms while they were being refurbished and could have left materials behind before the grievants took possession. Thus the grievants did not have exclusive control of their rooms, the arbitrator concluded. Others could have entered and left behind small amounts of marijuana.

The evidence provided room for doubt about whether the grievants had possessed the marijuana, the arbitrator ruled. Because of problems with mitigation, reinstatement was not accompanied by full back pay.

The Dispute

On May 17, 1989, Alan Cash, the grievant, was a pumpman on the Exxon Washington, a tanker in the company's fleet. The vessel was at anchor in San Francisco Bay.

William G. Newman, a contractor who was assisted by an agent of his company, used 2 canines, Tuit and Mo, to search the vessel for drugs on May 17th (T. I. 83). Mr. Newman has a background as a law enforcement officer who worked in the area of narcotics detection. He testified to extensive training in the identification of drugs (T. I, 63-65). The witness used chemical field tests in identification of marijuana (T. I, 66). Among the other skills the witness has learned and taught is the methodology in the use of the Becton Dickenson Duquenois-Levine test which is utilized in field testing for marijuana (Ex. C-7) (T. I, 78).

On May 17, 1989, the search team personnel and the dogs were introduced to the ship's crew. The crew was searched before the vessel's areas were examined (T. I, 130-131). The living quarters and other areas of the vessel then were searched. When the room of Mr. Cash was examined, grievant was present as well as the temporary ship's representative Taylor Kissinger (T. I, 85-86). The search in Mr. Cash's room was the same as in the other areas and included (T. I, 87)

> all of the cabinets, desks, the restroom, suitcases, any personal item in the room, also the ceiling, the bed, everything in the room.

Items allegedly associated with marijuana were discovered. The dogs both were used and gave alerts (T. 89-90). Green plant material was found in a cabinet drawer and in the desk (T. I, 91). This was placed in an evidence bag and an identifying notebook sheet was put in the bag (T. I, 96). Two cigarette ends or "roaches" were found in a suitcase pouch and were placed in an evidence bag with an identification notebook sheet. Grievant had stated the suitcase was his (T. I, 98). Green ash was discovered by the bedpost and was bagged and labeled (T. I, 100-101). Marijuana seeds were found—according to the testimony (T. I, 101)

> in various areas of the room under the carpet and then also on the carpet.

These seeds were bagged and had an identifying paper written (T. I, 101).

[When field tests were performed in the captain's quarters, identification sheets were written by Mr. Newman. The information on these sheets (Exs. C-8, C-9, C-10) was transcribed from the notebook sheets placed in the 3 evidence bags (T. I, 103). The chairman noted at the hearing and again repeats that the contemporaneous writing (Ex. C-9) differed somewhat from the testimony in describing the location where the marijuana seeds were

found, *i.e.*, "l. various areas *under* the carpet". (Emphasis applied by chairman.)]

The ends of the cigarettes were examined microscopically and by application of the Duquenois-Levine test. They were identified positively as marijuana (Ex. C-8). The seeds and green ash material were identified by microscopic examination (Ex. C-9). And the green plant materials from cabinet and desk were identified by both microscopic examination and chemical test (Ex. C-10). In each case, only part of the material was used. The remainder was sealed in the plastic bags. Red evidence tape was used (T. I, 111). (See Exs. C-14, C-15, C-16). The bags then were sealed in a "Federal Express envelope or box" and sent to an independent laboratory in Fort Collins, Colorado for a confirming GMS test (T. I,112). The ash material was tested at the independent laboratory and not by Mr. Newman (T. I. 124).

[The cross of this witness and of Robert K. Lantz, Ph. D. of the Rocky Mountain Instrumental Laboratories raised chain-of-custody questions as well as other issues. The chairman will not review this aspect of the case because the decision in the dispute will not turn on such questions. The chairman is satisfied from the field tests—and from the laboratory tests as well, setting aside chain-of-custody questions—that the materials found in Mr. Cash's room contained, or were, marijuana. *The question on which this opinion will turn is whether Mr. Cash was shown to be the person responsible for the marijuana in that room.*]

On cross, Mr. Newman testified that he was told a) that Mr. Cash had previously occupied another room and b) that someone else previously had occupied the room Mr. Cash was in at the time of the search (T. I, 138-139). The room Mr. Cash had occupied before moving to the cabin in question had been examined. The Newman team examined all of the rooms. The team "*had found nothing in any of the other rooms* . . ." (T. I, 139).

[The Canine Detection Incorporated identification sheets (C-8), (C-9), (C-10), were again introduced through Dr. Lantz. The exhibits at the time of readmission (Exs. C-14, C-15, C-16) had evidence bags attached. These bags contained seeds or small amounts of other material. As the chairman already has noted, the evidence of Dr. Lantz, through whom these exhibits entered, will not be reviewed here.]

Further Company Testimony

Grady T. Shearer, III, a west coast personnel specialist, was involved in the May 17, 1989 search of the Exxon Washington (T. III, 5-6). Mr. Shearer testified that *all* the rooms and common areas were searched (T. III, 7).

Ship's representative Taylor Kissinger was invited to go along with the search team, the witness stated. Mr. Kissinger was present when Mr. Cash's room was searched (T. III, 8-9). (The search process was explained. But in light of the chairman's conclusion that marijuana indeed was found in grievant's room, this description need not be reviewed. The same remark is appropriate with regard to the description of the testing process in the captain's quarters.)

Mr. Shearer did testify that while the testing was going on, Mr. Cash sometimes was in the room and sometimes was not. "He came in and out" (T. III, 21-22). Taylor Kissinger was present throughout the testing (T. III, 25). The ship's representative signed the evidence tape on each specimen bag after Mr. Newman sealed it (T. III, 31).

When he was informed of the positive results of the field tests by Mr. Newman, Mr. Shearer contacted Acting Human Resources Manager David Walker in Houston to obtain permission to require a drug test from Mr. Cash (T. III, 33). After Mr. Walker concurred, the management personnel on the ship were informed, and grievant,

with Mr. Kissinger present, was told he would be required to take tests for drugs and alcohol. Mr. Cash would not agree to be tested (T. III, 34).

Grievant was informed that his refusal would lead to discharge from the vessel and probably from the company (T. 34-35). Mr. Kissinger called the union. Grievant again refused and was discharged from the vessel, paid some monies due him, and sent ashore (T. III, 35).

Prior to the search, Mr. Shearer testified on cross, no one aboard the ship was charged with being under the influence of or of using or possessing drugs. Nor could the witness say that from his observation, Mr. Cash either was under the influence of or used drugs (T. III, 44). The witness also said *that what was detected in Mr. Cash's room was "the only thing we found, yes"* (T. III, 44) [in the vessel.]

Mr. Shearer emphasized that grievant was told he had no choice about taking the test. When asked whether there would have been no discharge if Mr. Cash had taken a test which was negative, the witness said (T. I, 45)

> I don't know. That's speculative.
> I don't know what would have happened.

On recall, the witness insisted that he told Mr. Cash several times of the consequences of *not* taking the drug test (T. III, 246).

On cross it developed that while a vessel search had been scheduled for the period around May 17, 1989, the Exxon Washington was selected as the ship to be searched because another crew member had reported finding a hand rolled cigarette upon joining the vessel on May 10th (Ex. U-2) (T. III, 53).

Mr. Shearer was aware that several weeks after the incident, *i.e.*, June 2, 1989, (See Exs. J-2A, U-4), the union offered the company the opportunity to test Mr. Cash (T. III, 59).

In May 1989, David Walker was the labor relations coordinator for Exxon Shipping Company and also was acting human resources manager. (The manager, Dan Paul, was in Valdez, Alaska) (T. III, 74).

On May 17, 1989, Mr. Walker was informed by Mr. Shearer of the vessel inspection. The witness was told that dogs had alerted during the search of Mr. Cash's room and that materials which tested as marijuana were found (T. III, 95-96): The company's policy as well as the requirements in the Coast Guard regulations were that such a finding constituted reasonable cause to require a drug test (T. III, 96). The witness authorized the test. He later learned of grievant's refusal to take the test. This led to discharge from the vessel (T. III, 97).

A meeting of the personnel relations committee, which grievant and his union representative declined to attend, was held on June 5, 1989, Mr. Walker testified. The witness did have a telephone conversation on June 5th, with John Farrell, a member of the union's board of governors (T. III, 98).

The personnel relations committee had a report from the search committee about what was found. It had the subsequent independent laboratory report. In light of the facts that all employees had been informed of the company policy and that Mr. Cash had refused to take the drug test, discharge was recommended. (Mr. Farrell told Mr. Walker that grievant was willing to take the test on June 5th. The offer earlier had been made by Mr. Farrell to the company's labor relations analyst, Jeanne Kraus). (T. III, 104). Mr. Cash was terminated after the committee recommendation (T. III, 109).

The reason the offer to take the test was refused was that it allegedly would not have given a good indication of drug use as of May 17th, and because Mr. Cash had been obligated to take the test at the time he was directed to do so on May 17th (T. III, 105).

When the chairman asked, Mr. Walker said that a negative outcome on the test would have been a mitigating factor. The witness did not say that such a negative result would have been dispositive (T. III, 106-108).

On cross, it developed that Mr. Farrell on June 2nd had told Ms. Kraus that Mr. Cash would take the test (T. III, 118).(See Ex. J-2A.)

On recall, Mr. Walker testified that during PRC meeting of June 5, 1989, he spoke by speaker phone to Mr. Cash and Mr. Farrell who were at the union offices in New Jersey.

Mr. Cash said that before he joined the vessel the suitcase in which the hand rolled cigarette ends were found was purchased by his wife at a used store (T. III, 256). Nothing was said in this call about any alleged drug test that Mr. Cash took after leaving the vessel (T. III, 257).

Union Testimony

Alan Cash testified to his career at the company which culminated in his sailing as a chief pumpman. His evaluations showed only one adverse notation (in 1977) on his work (Ex. U-1).

Grievant testified that he never had any contact with or possession of drugs (T. III, 126).

At the beginning of May 1989, Mr. Cash was assigned to the Exxon Washington. There was another chief pumpman aboard (T. III, 127).

Mr. Cash testified that he took the suitcase in which the marijuana cigarette ends were found from the oilskin locker on the Exxon Benicia in 1988 or at the end of 1987. It was somebody else's suitcase which grievant took because he needed additional carrying space. He continued to use it after taking it and never noticed "anything out of the ordinary inside of it" (T. III, 128-129).

When grievant boarded the Exxon Washington, the other chief pumpman was still there and did not leave until 2 days before the search. Prior to Mr. Cash's moving into that room, he was in another which he said was really a storage room and was the old second pumpman's room (T. III, 119-130). The chief pumpman's quarters were preferable; so grievant moved into them when the prior occupant, Joe Victorio, left (T. III, 130-131).

Nothing was found in the space he previously had occupied so far as Mr. Cash knew (T. III, 131).

Utility men clean the rooms. But the one at issue had not yet been cleaned. The ship was in port, and Mr. Cash did not wait for the cleaning to be done. Instead, he moved in at once (T. III, 133). Grievant left the door unlocked as he always did (T. III, 135).

On May 17, 1989, after the vessel anchored, the crew was gathered and told of the search, grievant testified. The search was done with dogs. Mr. Cash had participated in such searches before (T. III, 136).

When grievant's room was searched, Mr. Newman, his associates, the dogs, Mr. Shearer and Mr. Kissinger were present as well as Mr. Cash (T. III, 138). Grievant was shown 2 seeds which were found under the carpet (T. III, 139). Nothing else was shown to Mr. Cash until the searchers reached the closet area (T. III, 141). Grievant agreed that the suitcases in the closet could be searched. In a pouch, "Two little balled-up pieces of paper were found" (T. III, 141). They were described to grievant as marijuana cigarette ends—"roach ends" (T. III, 142). The cigarette ends and 2 seeds were all that was shown to Mr. Cash before the captain confined him to his quarters as the party went midship to run tests (T. III, 144).

Thereafter, grievant was called to the captain's office to be told the test results. The captain was present as were Managers McDonald and Shearer, Mr. Kissinger and Mr. Newman (T. III, 145).

Mr. McDonald stated that the tests were positive for marijuana. Grievant was told that he was required to take a drug test. If he took it, he would be terminated from the vessel and later told his employment status. If he did not, he would be terminated from the ship and probably the company. (The transcript, III, 146 was supplemented by the chairman's notes to articulate the answer.)

Grievant told the managers he wanted to talk to some member of the union's board of governors. He was not allowed to use the telephone (T. III, 147). [The chairman notes that Mr. Kissinger, who could have testified on this and about other points where grievant's statements differed from those of company witnesses, was not called.]

Mr. Cash rejected the test. Grievant knew the union had not agreed to accept such testing (T. III, 148-149). He so informed the captain (T. III, 154). Mr. Cash was terminated from the vessel, went ashore, and reached his home on May 18, 1989 (T. III, 137). He contacted Mr. Farrell of the board of governors 2 or 3 days later (T. III, 158). Mr. Farrell told Mr. Cash to take the drug test (T. III, 160).

About a week and one-half after his discharge from the vessel, Mr. Cash testified, he went to Smith, Klin & French Laboratories and took a drug test. Cindy Williamson, a technician, orally informed grievant, who did not ask for a writing at the time, that the test result was negative (T. III, 161). Grievant later attempted to obtain a writing but never was able to do so (T. III, 166). [The chairman reiterates his remark made at the hearing that Mr. Cash's testimony on this point constituted hearsay.]

Grievant testified that before, during and after May 1989, he never ingested drugs (T. III, 166). He is prepared to take a drug test at any time (T. III, 169).

Grievant swears that what was found aboard the ship was not his (T. III, 170).

[Facts were elicited about Mr. Cash's post discharge attempts to earn monies. As will become apparent below, this evidence is not relevant to the chairman's decision of the dispute and will not be reviewed.]

On cross, it was developed that Mr. Cash served on the Exxon Benicia, the vessel from which he allegedly took the suitcase, in 1986 (T. III, 171).

At the time of the search, Mr. Cash testified on cross, he made no statement that he obtained the suitcase on the Exxxon Benicia (T. III, 181). He said nothing about the suitcase in the captain's quarters, either (T. III, 187).

Mr. Cash testified that he never conferred with Taylor Kissinger in the captain's quarters. Mr. Kissinger was present, however (T. III, 183). Mr. Kissinger was given permission to use the telephone and attempted to call the board of governors. The ship's representative could not reach anybody (T. III, 184). Mr. Kissinger never gave Mr. Cash advice as to what to do, grievant stated when the chairman inquired (T. III, 186).

The company did *not* give Mr. Cash several opportunities to change his mind about taking the test, he testified (T. III, 188).

The test results from Smith, Kline & French came in about 3 days after Mr. Cash took the test, he said. Grievant did not report the negative result to the company, but he may have told Mr. Farrell (T. III, 200).

Despite the fact that Mr. Cash may have said on June 5, 1989 that his wife bought the suitcase before he joined the Washington, actually grievant obtained the suitcase on the Benicia, he insisted on cross (T. III, 207). Grievant remembered telling the PRC that his wife bought the bag, but he was wrong, he stated (T. III, 211).

On redirect, Mr. Cash again said that the suitcase was a used bag and that the cigarette ends were not his (T. III, 224). He also stated that in the 2 days he was in the room, he worked 36 hours, *i.e.*, 18 hours each day (T. III, 237).

Position of the Company

The company submits that its April 1, 1988 policy statement permitted tests when "*cause exists to suspect* alcohol or drug misuse." This policy and Coast Guard regulations on the subject were emphasized in the September 27, 1988 letter in which, as permitted by the Brent award, official notice of the policy issued. "Termination of employment" was set forth as the penalty for violation.

The pertinent November 21, 1988 Coast Guard regulations requiring chemical testing are cited. The April 28, 1989 Coast Guard reasonable cause requirement is noted: "evidence of use is sufficient to require testing." Drugs or drug paraphernalia in clothing or staterooms were defined as "physical indicators."

The search of the Exxon Washington then is reviewed. Mr. Newman's testimony about finding the drugs in grievant's room is noted. The company submits that pursuant to its policy Mr. Cash was directed to be tested and refused to accede.

On the basis of its own policy of April 1, 1988 and on the basis of the Coast Guard regulations, there was ground to require testing. The company policy allows tests where "cause to suspect . . . drug misuse" exists. The Coast Guard regulations permit testing where a seaman "is reasonably suspected" of drug use.

Arbitrator Parker upheld the right of the company to conduct unannounced searches of vessels. An experienced and trained expert, Mr. Newman, conducted the search, found suspected material in Mr. Cash's room, and estab-

lished by field chemical tests and microscopic analysis that the material was marijuana, the company maintains. This led to the demand for a test.

Despite the argument of the union against requiring such tests, the Newman discoveries and field tests provided a reasonable suspicion of drug misuse under the company policy, it is asserted. The policy uses the words "cause . . . to *suspect*" rather than "probable cause" or "reasonable cause" it is noted. Arbitral authority is cited to show that presence of "rational grounds for testing . . . , not whim or caprice" is sufficient to permit testing. Such grounds would exist even in the absence of impairment, it has been found, so long as the employer was not "arbitrary, capricious, malicious, or discriminatory."

Here the company had cause to suspect Mr. Cash, it is contended.

> Finding marijuana not only in the room but also in the grievant's suitcase established a reasonable suspicion of drug use.

Finding the marijuana in the personal belongings of grievant constituted a physical indication of use under the Coast Guard regulations, it is further submitted. The presence of the "roaches" in the suitcase is stressed. The employer is obligated to comply with Coast Guard regulations, it is asserted.

Since Mr. Cash refused to take the drug test, he violated the company policy and was subject to discharge under it, employer submits. And under the Coast Guard regulations [which do not set forth discharge as a penalty], grievant was obligated to accept a test when reasonably suspected of using marijuana. The company on September 27, 1988 stated that violation of Coast Guard regulations would result in termination [but that termination would arise under company policy and not Coast Guard regulation.] The Coast Guard regulations established a basis for testing even if, as grievant believed, such testing had not been bargained with the union.

In any case, no union testimony was received showing that Mr. Cash was told to refuse the test or that testing had not been bargained. Mr. Cash ignored the rule "obey now, grieve later." Arbitral authority is cited to show that discharges arising from refusals to take drug tests have been sustained.

Mr. Cash's testimony did not explain or justify his refusal to take the test, the company contends.

Grievant never previous to the arbitration said he obtained the suitcase on the Exxon Benicia. If he did obtain it there, that would have occurred in 1986. But he had told the PRC his wife purchased the suitcase just prior to his boarding the Exxon Washington. Allegedly, "neither story is credible and neither should be believed."

In any case, finding the drugs in the suitcase was cause for testing, it is asserted. "The order to test was justified regardless of where the roaches in the suitcase came from." And other drugs were found in his room.

It is unlikely, the company charges, that someone else left drugs in the room and also that someone else left drugs in the suitcase.

Allegedly, by agreeing to be tested in June, Mr. Cash and the union acknowledged that the company had cause to test him. [The chairman notes that the acknowledgement could have been that the company had the unilateral power to require a test whether or not there was cause.] Grievant had received the company policy letter and was presumed to know the Coast Guard regulations.

The company challenges the drug test "story" offered by grievant. [The chairman agrees that this account was hearsay unsupported by any documents or witnesses. In coming to a decision, the chairman will not credit grievant's allegations. Hence he will not further review the company contentions concerning it.]

The offer to take a test on June 2nd and June 5th did not mention the Smith, Kline & French test, it is noted. The later offers were "unreasonable".

Where Mr. Cash's testimony contradicted that of Messrs. Shearer and Newman, grievant should not be believed, the company submits. He was not credible concerning the suitcases, and the other witnesses corroborated each other at a number of points. Furthermore, Mr. Kissinger was not called.

The company notes that arbitral authority holds the chairman may not substitute his judgment as to penalty if he finds the charges are proved. The prior opinion of Arbitrator Marx is cited.

Since Mr. Cash violated the Coast Guard regulations, public policy dictates that he should not be reinstated, the company submits.

Discharge is the only penalty appropriate for the violation of both company policy and Coast Guard policy by refusing to take the drug test, the company submits. Arbitrator Marx ruled in reviewing the company's posted rules that an arbitrator cannot alter a previously announced and applicable penalty.

The company asks the chairman to deny the grievance.

Position of the Union

The union submits that in charging Mr. Cash, the company ignored its own January 18, 1989 evaluation of "exceptional" in a number of areas including "personal hygiene habits" and "principles of general shipboard sanitation."

The discharge, it is noted was based on 2 considerations: drug substances found in grievant's quarters and personal belongings; and his refusal to take the drug test. Yet when the company continued those sections of the predecessor contract which had not arisen in bargaining, the section on termination for "cause" was retained. Past

practice and arbitration awards have held that this means "just cause," it is asserted. Thus, the union argues, discipline must be "fair and just," and rules must be "reasonable in . . . scope and applications."

The union notes the distinction in the drug policy language. This makes use or possession of drugs on company property "grounds for termination." But it states that refusal to submit to a drug test is "grounds for disciplinary action. . ." At various places the policy refers to "disciplinary action which *may* include termination." The just and fair cause language retained in the contract allegedly requires that discipline arising under the drug policy must be considered with reference to the just cause standard, it is asserted.

> One of the basic positions of the Union in this case is that using the standards evolving out of the contract language and, indeed, the policy statement, a refusal to consider progressive discipline or to take action other than discharge is an unfair and unjust application of discipline.

The Union notes that Mr. Cash was in the room for 1½ days at the time of the search. The chief pumpman had left on emergency leave. And, as in the case decided by Arbitrator Parker, the rooms were open for access by many persons. At a later point, the union emphasizes that the search was precip[it]ated by Seaman Byrd's finding someone else's possible marijuana cigarette in his newly assigned room.

The union repeats Mr. Cash's contention that he took the suitcase from the changing room on the Exxon Benicia.

The propriety of a search of personal effects without a search warrant is questioned. [Mr. Cash testified that he agreed to the search of the suitcase, and he did not testify that he was under "duress." The Parker award found that such searches could be conducted, and arbitrators have ruled similarly under other contracts.]

It is argued: there was no proof of the age of the material in grievant's room. In whatever way Mr. Cash got the suitcase, it was "used" by someone else before him. The objects were tiny and would probably have escaped grievant's notice, it is contended. The items were of such minute quantity as not to justify use of the word "possession" of drugs, the union asserts.

Nothing, it is noted, was found in the room grievant previously had used for a much longer time. It was inconsistent that no marijuana was found there if Mr. Cash was using the drug. Allegedly

> it is impossible to conclude that Cash justifiably, should be saddled with [the room's] contents particularly in view of the . . . . limited amount of material found.

Mr. Cash had not yet cleaned the room; the door was left unlocked; and grievant worked 36 hours in the 1½ days he had the room.

[The chairman shall not review the challenges concerning the search, handling, tests and transfer of the material found. As earlier stated, the chairman is satisfied that drug materials were found. The chairman will emphasize that despite the testimony, the contemporaneous data sheet shows that the marijuana seeds were found under the carpet.]

With regard to the failure to take the drug test, the union offers a number of contentions.

It notes that the requirement to take the test was the subject of a bitter company-union dispute. Mr. Cash knew the union's position and had been told to refuse testing. He informed the captain the test had not been bargained. Board of Governors Member Farrell insisted that grievant refuse the test. Mr. Farrell later apologized for doing so.

Allegedly, it was unfair to discharge a person caught in the midst of this union-company dispute.

Mr. Farrell, when reached by grievant, promised to contact the company to say Mr. Cash would take the test. By the date of the June 5th PRC meeting, Mr. Farrell had done so. The company refused the offer despite knowing that marijuana remains in the body at least 15 days according to the company's own expert at the *Foster* hearing. It is noted that the company's position as stated by Mr. Walker was that Mr. Cash was required to take the test and that no later offer to do so would be exculpatory. Allegedly, this company position in light of the dispute with the union over testing was fundamentally unfair.

When the chairman asked, the company never said that a negative test would change the outcome, the union notes.

Among other arguments the union submits that

> Neither the Company's policy nor the Coast Guard require discharge for refusing to take a test even where cause exists.

Since the company policy identifies refusal of a test as "grounds for disciplinary action including dismissal", Arbitrator Scheinman, in *Foster,* found that even a positive result does not require discharge, and he set one aside.

The PRC, it is charged, refused Mr. Cash's offer to take a test which the committee could have considered. Nor was weight given to grievant's "previous excellent and consistently highly rated work history of some 13 years."

The union further charges that Mr. Cash's fundamental rights were denied when he requested and was denied the right to call a member of the board of governors. Grievant's testimony remains unrebutted since Mr. Shearer could not recall if grievant made the request or whether, if the request was made, it was refused.

The union asks reinstatement of Mr. Cash with full back pay and benefits.

Discussion

The chairman credits the testimony of Mr. Newman that marijuana or marijuana residue was found in the cabin used by Mr. Cash as of May 17, 1989. It is highly significant that *no* traces of the drug were found in the quarters used by grievant between May 10 and May 15, 1989.

The union contends that only a very small amount of drug was found, in any case. Apparently this is true. But what was found was discovered in a *number* of places: green leafy material in desk and cabinet; ash on the rug near the bed; seeds *under* the rug; cigarette ends in a suitcase pouch.

The company does not rebut the fact that Mr. Cash was in the room for only 1½ days, and for only a few hours daily then. It is not disputed that a chief pumpman and another pumpman used the cabin before grievant moved in. As in the case before Arbitrator Parker, other persons had full access to the room because the door was unlocked. Grievant's unrebutted testimony is that because he did not want to interfere with their shore leave, he did not ask the utility men to clean his cabin. In sum, the cabin had not been cleaned at the time of the search, had been used by a number of persons in previous days, and was open to others.

Except for what was found in the suitcase, it is not reasonable to attribute, by clear and convincing evidence, ownership of the drug materials in the cabin to Mr. Cash. As noted above, the materials were found at scattered points in the room. The 6 marijuana seeds were, according to the contemporaneous record, under the rug. But even if only some of them were there, it is hard to see how grievant could have gotten any under the rug. He was only in the room a short time.

It is instructive to compare the searched cabin's condition in which widely scattered material was found to the condition of the former cabin where no material was found at all.

The circumstantial evidence certainly does not point to only the one logical conclusion that the material belonged to grievant. The ash could have been left by others, but it is not easy to see how Mr. Cash could have avoided stepping on it if it was there all along. Still, the evidence is no stronger that he deposited the ash than that it was there and he missed it. The chairman concludes that in the absence of any drugs in grievant's previous room, the probabilities are greater that Mr. Cash did not introduce the marijuana into his cabin prior to the search of May 17, 1989 than that he did.

If there was no reasonable cause to conclude that grievant brought the drug into the cabin—and the above analysis finds that there was not—then the Coast Guard regulations would not call for a drug test, and no violation of the regulations could be said to exist. The question of whether there was cause under the company policy will be considered below.

The matter of the suitcase is the weakest point of Mr. Cash's defense against the charge that he violated company policy by introducing marijuana into his cabin. (Even in light of this, the higher Coast Guard standard of "reasonable cause" could not be met because of a) previous occupancy of the room, b) lack of drugs in grievant's previous room, and c) the other considerations discussed above. The lower company standard conceivably might have been met by the suitcase materials.)

Mr. Cash was either incorrect when he told the PRC that his wife purchased the suitcase for him or when he testified at the arbitration that he acquired the suitcase on the Exxon Benicia. Since no doubt has been cast on his assertion that when he got the piece it was used, that weakness of testimony may make no difference. The undiscovered cigarette ends could have been in the pouch no matter how the bag was obtained. Nevertheless, the lack of candor and/or of accuracy was not supportive of grievant. Nor was his frequent inability to recall or to answer questions directly.

Still, there is doubt how the "roaches" got in the bag. No inference can be drawn from the presence of the other marijuana in the searched room that grievant put the "roaches" in the bag. The chairman has found that there is considerable doubt Mr. Cash brought the other drug traces into the cabin. The most that can be said about the butts in the bag is that they would be strongly suspicious in the absence of the contrary circumstantial evidence about the other materials found.

As many arbitrators have ruled, including Dr. Parker in *Pollard and Olsen,* circumstantial evidence must lead to one and only one logical conclusion. That cannot be said here. Mr. Cash could not be discharged for possession of marijuana after this evidence is viewed under a just cause standard.

We must come to an *ex post* conclusion about whether there was cause to order a drug test. On May 17, 1989, in light of what Mr. Newman and his cohorts found, "cause" *did* exist. (That will create problems about grievant's refusal to take the test even if the above discussion raises questions concerning the basis for the test order.) The instant review of the findings concludes, however, that even though drug material was discovered in grievant's cabin, sufficient question was raised about ownership of the drugs so that "cause" "reasonable cause", "probable cause" or "just cause" did not exist to order a test. And Mr. Shearer's testimony established that Mr. Cash's appearance and actions provided no basis for ordering a test.

The chairman concludes that if Mr. Cash had taken the demanded drug test and then had grieved, a later arbitration would have found that lack of "cause" "reasonable cause" "probable cause" or "just cause" to have ordered a test on the basis of what was found in the cabin would have led to reversal of any discipline based on test results. This analysis of the findings of the search shows that a

test could not have been ordered on the basis of what was discovered in the cabin.

Having said this, the chairman must rule that in refusing the drug test, grievant violated the fundamental rule that except when an order imperils health or safety, employees must first obey an order and then grieve. It is of no import that the union challenged the company's right to test and that Mr. Cash knew it. If the union was right, an arbitrator would have invalidated the test on the basis that the company could not impose it unilaterally. But until an arbitrator issued such a ruling, the company, and not the union, had the power to decide what would be done.

While the company, if it chose, could decide that a later offer to take a test would wipe out, or at least mitigate, the original refusal, an arbitrator has no power to substitute his judgment for this reason. Discharge was possible under the rules. As Arbitrator Marx stated, an arbitrator cannot alter the rules.

Mr. Cash's alleged later drug testing cannot be considered by the chairman to be mitigating. There is no documentary proof that a test was taken and no documentary proof of the results, even if the results might, *arguendo,* excuse Mr. Cash's original refusal.

The chairman faces a dilemma. To sustain the discharge of Mr. Cash for refusal to take a test which might not have helped him even if the results were negative and for which no element of cause *ex post* was found to exist, appears to be at variance with a just cause standard—or any other standard of cause. Unlike cases submitted by the parties, Mr. Cash was not found to be under the influence of alcohol or drugs, nor is that charged against him.

On the other hand, grievant was insubordinate. Any positive remedy might be considered a victory or reward for improper behavior.

The chairman has concluded that since the order to take the drug test arose out of an incorrect evaluation of the meaning of the marijuana found in Mr. Cash's cabin, discharge for failure to accept the test is not possible. However, though the penalty may be considered harsh, reinstatement must be without back pay but with full seniority.

AWARD

In light of the foregoing discussion, I, the undersigned neutral chairman, being duly sworn and those members of the panel of arbitrators who sign as concurring, having received the testimony, evidence and argument of the parties in a preceeding at which both were represented ably by counsel, issue the following

AWARD

The discharge of Alan B. Cash was not for just cause. Mr. Cash shall forthwith be reinstated with full seniority but without back pay.

/s/ Maurice C. Benewitz
MAURICE C. BENEWITZ
Neutral Chairman

Dated: November 27, 1992

[Notary Omitted in Printing]

I (concur with) the above award

/s/ Howard A. Goldberger
HOWARD A. GOLDBERGER, ESQ.
Union Appointed Arbitrator

Dated: November 30, 1992

[Notary Omitted in Printing]

I (dissent from) the above award

/s/ William P. Hoeler
WILLIAM P. HOELER
Company Appointed Arbitrator

Dated: 12/9/92

[Notary Omitted in Printing]

APPENDIX D

EXXON SHIPPING COMPANY

Policy Statement on Employee Alcohol and Drug Use

Exxon Shipping Company is committed to a safe, healthy, and productive work place for all employees. The Company recognizes that alcohol, drug, or other substance abuse by a few employees will impair their ability to perform properly and can have serious adverse effects on the safety, efficiency, and productivity of other employees and the Company as a whole. The misuse of legitimate drugs or the use, possession, distribution, or sale of illicit or unprescribed controlled drugs on Company business or premises is strictly prohibited and is grounds for termination. Possession, use, distribution, or sale of alcoholic beverages on Company premises is not allowed without prior approval of appropriate senior management. Being unfit for work because of use of drugs, or alcohol is strictly prohibited and is grounds for termination of employment. While this policy refers specifically to alcohol and drugs, it is intended to apply to all forms of substance abuse.

The Company recognizes alcohol or drug dependency as a treatable condition. Employees who suspect they have an alcohol or drug dependency are encouraged to seek advice and to follow appropriate treatment before it results in job performance problems. Employee Health Advisory Program or medical professional staff will advise and assist in securing treatment. Those employees who follow approved treatment will receive disability benefits in accordance with the provisions of established benefit plans and medical insurance coverage consistent with existing plans.

No employee with alcohol or drug dependency will be terminated or otherwise disciplined solely due to a request for help in overcoming that dependency or because of in-

volvement in a rehabilitation effort. If, however, an employee violates provisions of the Employee Alcohol and Drug Use Policy, appropriate disciplinary action will be taken. Such action cannot be avoided by a request at that time for treatment or rehabilitation. If an employee suffering from alcohol or drug dependency refuses rehabilitation or fails to respond to treatment or fails to meet satisfactory standards of effective work performance, appropriate disciplinary action, up to and including termination, will be taken. This policy does not require and should not result in any special regulations, privileges, or exemptions from normal job performance requirements.

Exon Shipping Company may from time to time conduct unannounced searches for drugs and alcohol on owned or controlled property. The Company also has the right to require employees to submit to medical evaluation or alcohol and drug testing where cause exists to suspect alcohol or drug misuse. A positive test result or refusal to submit to a drug test is grounds for disciplinary action, including dismissal.

Contractor, common carrier, and vendor personnel are also covered by paragraph one and the search provisions of paragraph four of this policy. Those who violate the policy will be removed from Company premises and may be denied future entry.

April 1, 1988 Implemented for Unlicensed Oceangoing Employees.

APPENDIX E

EXXON SHIPPING COMPANY
Post Office Box 1512
Houston, Texas 77251-1512
"EXXSHIP HOUSTON"

D. J. Paul
Human Resources Manager

September 27, 1988

TO ALL OCEANGOING EMPLOYEES OF
EXXON SHIPPING COMPANY

Recent developments by Exxon Shipping Company, the United States Coast Guard, the United States Customs Service, and Labor Arbitrators have focused a renewed emphasis on our commitment to providing a safe, healthy and productive work place by ensuring that drug, alcohol or other substance abuse is eliminated. The purpose of this communication is to ensure that all employees are aware of the various rules, regulations and company policies regarding substance abuse in the work place and to give notice that enforcement will be more stringent in the future.

Exxon Shipping Company Employee Alcohol and Drug Use Policy

On March 11, 1987, the Exxon Shipping Company Policy on Alcohol and Drug use became effective for all non-represented employees and was mailed to all employees. The Exxon Radio Officers Association accepted the policy during our 1987 contract negotiations. On April 1, 1988, we implemented the Alcohol and Drug Use Policy for all unlicensed Oceangoing employees. A copy of this policy was again mailed to all unlicensed employees as a part of the total implementation package at the conclusion of bargaining with the Exxon Seamen's Union.

The Company Policy specifically prohibits the misuse of legitimate drugs or the use, possession, distribution, or sale

of illicit or unprescribed controlled drugs on Company business or premises. Possession, use, distribution, or sale of alcoholic beverages on Company premises is prohibited. Being unfit for work because of use of drugs, or alcohol is strictly prohibited and is grounds for termination of employment. Exxon Shipping Company may from time-to-time conduct unannounced searches for drugs and alcohol on owned or controlled property. The Company also has the right to require employees to submit to medical evaluation or alcohol and drug testing where cause exists to suspect alcohol or drug misuse. A positive test result or refusal to submit to a drug test is grounds for disciplinary action, including dismissal. The guidelines for Supervisors, which were bargained with the Exxon Seamen's Union, are essential to the administration of this policy and should be familiar to every employee.

1. At the discretion of the President or Fleet Manager, the Company may conduct unannounced alcohol and drug searches on owned or controlled property where there is reasonable cause to suspect that these substances may be present. Reasonable cause may include searches in operations where use of these substances could create an unsafe situation.

2. The decision to require an employee to submit to testing for drugs and alcohol requires the advance endorsement of the Human Resources Manager. Prior to any testing, the employee must sign an Informed Consent form. In cases where a medical evaluation is deemed appropriate, medical personnel should be asked to collect a urine and/or blood sample for testing to determine the presence of alcohol and/or drugs. Blood tests will not be taken on board ship by vessel personnel. If circumstances prevent medical evaluation from being conducted soon after the "for cause" incident, Management may collect and properly process the urine sample.

3. Employees who acknowledge they have either an alcohol or drug dependency and who desire rehabilitation and are willing to cooperate by participating in a treatment program are encouraged to seek assistance through the Employee Health Advisory Program (EHAP) or the Medical Department.

   No employee with an alcohol or drug dependency will be terminated or; otherwise, disciplined due solely to a request for help in overcoming that dependency or involvement in a rehabilitation effort.

   However, if an employee's request for rehabilitation is made after the Company's discovery of a violation of the policy, the Company will take disciplinary action which may include termination. Such disciplinary action cannot be avoided by a request for treatment or rehabilitation at that time.

DEPARTMENT OF TRANSPORTATION, U.S.C.G., 33 CFR Operating a Vessel While Intoxicated

Effective January 13, 1988, the U.S.C.G. Regulations governing operation of a vessel while intoxicated became final. These regulations are far more explicit and stringent than previous rules. For commercial vessels, a blood alcohol content (BAC) of .04% is considered intoxicated. When an intoxicant, either alcohol or drugs, affects a person's manner, disposition, speech, muscular movement, general appearance or behavior, the employee is considered intoxicated and in violation of the regulations. The regulations also require that while on a commercial vessel, a crew member shall not be intoxicated at any time and shall not perform or attempt to perform any scheduled duties within *four* hours of having consumed alcohol. The penalty for being intoxicated while on board a vessel is a fine of up to $5000, imprisonment for up to one year, or both.

Copies of these regulations are on board all vessels for your review and information. These rules place the primary burden for detecting, reporting, and reducing the incidence of intoxicated behavior on marine employers.

United States Customs Service "Sea Carrier Initiative Agreement"

The United States Customs Service has recently adopted a "zero tolerance" policy with respect to illegal drugs found on board vessels. A vessel on which nominal amounts of illegal drugs are found may be subject to seizure and forfeiture, even if the drugs are in the possession of a crew member for personal use. As a result, the management of Exxon Shipping Company has a responsibility to take appropriate action. Toward that end, we have entered into a voluntary agreement of cooperation with the United States Customs Service to reduce our liability in the event illegal drugs are found on one of our vessels. This 15 point agreement is called the "Sea Carrier Initiative Agreement." A complete copy of the Agreement has been sent to the Master of each vessel, the elected union officials of all represented employees and to each shore based manager.

Labor Arbitrators Awards

Over the last several years, licensed and unlicensed employees have been terminated for use and possession of alcohol or drugs while on board a vessel. Several employees have been suspended for alcohol "possession only." Four unlicensed employees terminated for use or possession of alcohol or illegal drugs were reinstated by arbitrators for various reasons.

With respect to violation of the Company's Policy on the prohibition of use or possession of alcohol and illegal drugs, arbitrators have been critical of management when the discipline is inconsistent. For example, in the matter of arbitration between the Exxon Seamen's Union and

Exxon Shipping Company, case no. 18 30 0062 85N, Arbirator, Daniel F. Brent, stated in part:

> ". . . It must be emphasized that the Company is entitled to prohibit alcohol and drugs and to police its work force in order that it may insure the safety of its workers and protect the general public from harm by the Company's vessels or product. To this end, the Company may promulgate rules reasonably designed to insure that no alcohol or habit forming drugs enter its premises. If in the past the Company has permitted a variety of penalties to be imposed for similar infractions, *the Company is entitled to give notice to the bargaining unit and to the Association that it will impose stronger penalties in the future* (emphasis added) than it has in the past in order to guarantee that its prohibition against alcohol and habit forming drugs is universally observed. . ."

This letter will serve as the notice stated in the arbitrator's award.

Conclusion

In view of Management's responsibility to enforce the Company Policy, the USCG regulations on "Operating a Vessel While Intoxicated," our liability under the "zero tolerance" policy of the U.S. Customs and the USCG as well as clear direction from Labor Arbitrators, we must aggressively ensure that our employees are not using or in possession of alcohol or illegal drugs while on board a vessel. This document serves as another *official notice* that violation of the Company Alcohol and Drug Use Policy, or regulations governing alcohol or drug use in the work place will result in immediate termination from the vessel. While we must continue to thoroughly investigate the facts of each individual case and make a final determination on a case-by-case basis, *termination of employment* is the penalty for violation of these standards.

We will continue unannounced alcohol and drug searches on owned or controlled property where there is reasonable cause to suspect that these substances may be present or in operations where use of the substances could create an unsafe situation. The tradition of providing wine at holiday meals will reluctantly be discontinued hereafter in order to ensure compliance with the new USCG regulations.

These actions will assist in providing a safe work environment free of alcohol and drug use and help assure uniform Company actions. If you have any questions or concerns regarding Management's position on alcohol or drug use while on Company property, please consult with the Master. You are urged to become familiar with all provisions to avoid placing your job in jeopardy.

/s/ Dan Paul

DJP:mdg

APPENDIX F

REPORT OF DISCHARGE
From: Head of (Department) Date May 17, 1989

To: Master
Arthur F. Tuttle At San Francisco

Subject: Discharge of (Name)
Alan B. Cash Rating Pumpman

I recommend that the above named seaman be discharged from the service of this vessel for violation of posted rule no. 9

The circumstances were as follows:

Violation of company's drug and alcohol policy

Was a Warning Issued to the Seaman?

☒ Yes

☐ No

Signed /s/ [Illegible]

(Department Head)

NOTE TO MASTER:

The seaman will be placed on undetermined status without pay pending review of the case by the Personnel Relations Committee. The seaman has a right to receive an advance against earnings by notifying you or Fleet Manning.

From: Captain Arthur F. Tuttle Date May 17, 1989

TO: EXXON SHIPPING COMPANY

I have investigated the circumstances in this case and approve the discharge of the above named seaman.

Signed /s/ [Illegible]

(Master)

Was a copy of this report given to Seaman?

☒ Yes

☐ No

APPENDIX G

EXXON SHIPPING COMPANY
Post Office Box 1512
Houston, Texas 77251-1512
"EXXSHIP HOUSTON"

D.J. Paul
Human Resources Manager

June 6, 1989

Mr. Alan Cash
3022 Templewood Drive
Atlanta, GA 30319

Dear Mr. Cash:

On June 5 and again on June 6, 1989, the Personnel Relations Committee met to consider the facts surrounding your discharge from the EXXON WASHINGTON in San Francisco, California on May 17, 1989.

Mr. Cash, on May 17, 1989 a contraband search of the EXXON WASHINGTON was conducted at anchor in San Francisco Bay. During the search, substances testing positive for marijuana were found in your quarters and personal belongings. Reasonable cause having been determined, you were required to submit to testing for drugs which you refused.

As a result of both of these incidents, you were found to be in violation of the Company's Drug and Alcohol Policy. Therefore, we have terminated your employment from Exxon Shipping Company on May 17, 1989 at close of business.

Shortly you will be receiving a packet from Exxon's Central Administration group with forms for you to sign. If you do not receive this packet within a few weeks, please contact them at 1-800-262-2363.

Sincerely,

/s/ J. F. McDermott
J. F. McDERMOTT
Fleet Manning Coordinator

JFM:dd

c: Payroll Dept.
Central Admin.
D. J. Paul
D. K. Walker
G. T. Shearer
ESU Offices

APPENDIX H

Portions of Coast Guard and Department of Transportation Regulations concerning Reasonable cause testing requirements, 46 C.F.R. § 16.250(a)-(d) (1989)

§ 16.250 Reasonable cause testing requirements

(a) The marine employer shall require any crewmember engaged or employed on board a vessel owned in the United States that is required by law or regulation to engage, employ or be operated by an individual holding a license, certificate of registry, or merchant mariner's document issued under this subchapter, who is reasonably suspected of using a dangerous drug to be chemically tested for dangerous drugs.

(b) The marine employer's decision to test must be based on a reasonable and articulable belief that the individual has used a dangerous drug based on direct observation of specific, contemporaneous physical, behavioral, or performance indicators of probable use. Where practicable, this belief should be based on the observation of the individual by two persons in supervisory positions.

(c) When the marine employer requires testing of an individual under the provisions of this section, the individual must be informed of that fact and directed to provide a urine specimen as soon as practicable. This fact shall be entered in the vessel's official log book, if one is required.

(d) If an individual refuses to provide a urine specimen when directed to do so by the employer under the provisions of this section, this fact shall be entered in the vessel's official log book, if one is required.

APPENDIX I

Portions of United States Coast Guard Random, Pre-Employment and Reasonable Cause Drug Testing Rules Facts and Information prepared by Investigations Department, U.S. Coast Guard Marine Safety Office, 1440 Canal Street, New Orleans, LA 70112-2711 (April 28, 1989)

What is testing for "reasonable cause"?

Reasonable cause means a probability exists, based on some evidence, that a crewmember is intoxicated by or has used drugs, or is intoxicated by alcohol. Alcohol intoxication on a commercial vessel is any BAC of .04% or greater. Note that in the case of drugs there need not be evidence of intoxication per se; evidence of use is sufficient to require testing.

Generally the following elements must be present to have "reasonable cause" to require drug and/or alcohol testing.

1. Direct observation of the suspected crewmember and/or any physical evidence by two persons in supervisory positions. This means the supervisors must personally see the evidence for themselves.

2. There must be some physical, behavorial, or performance indication of use or intoxication. Indicators include but are not limited to an individual's person. Drugs and drug paraphernalia as well as alcoholic beverage containers in clothing and personal property, or concealed in staterooms or elsewhere may also provide reasonable cause since these too are physical indicators. Smoke, breath and body odors may provide evidence. Slurred and incoherent speech, lack of coordination and balance, nodding and dozing off on watch, inability to report for duty, frequent or extended unexplained absences from assigned duties, sudden and wide changes of mood or attitude and many other observable variables are examples of some conditions which could constitute reasonable cause.

Since these circumstances and conditions could be caused by illness, injury or other factors, as well as drugs and alcohol, the decision to test for reasonable cause must be made with prudence and common sense.

3. When the marine employer determines that reasonable cause to require a test exists, the individual must be informed of that fact and directed to test as soon as practicable. The marine employer must specify whether or not urine or BAC testing or both are being required.

4. An entry concerning the basis of reasonable cause, the direction to test given the crewmember, and any refusal or other response should be logged. This log entry must be made whenever an official ship's log is required to be carried.

While there must be some observable evidence that a crewmember is intoxicated to have reasonable cause for alcohol testing, it is worth noting that a BAC of .04% or greater could be reached by consumption of less than three drinks in an hour. Observed odor of alcohol on a person's body or breath is reasonable cause to test.

A law enforcement officer may also order testing for reasonable cause. This means Coast Guard and other federal law enforcement officers, state police, harbor police, wildlife and fisheries officers, sheriff's deputies and municipal police officers: Anyone who has police jurisdiction where a vessel is found.

APPENDIX J

165550 Canada Limited
172965 Canada Limited
2849518 Canada Limited
571270 Alberta Limited
590320 Alberta Ltd.
AGA Progas a.s
Abu Dhabi Petroleum Company Limited
Ace Polymer Co., Ltd.
Acquifund Resources Limited
Aditivos Orinoco, C. A.
Adria-Wien Pipeline Gesellschaft mit beschrankter Haftung
Advanced Elastomer Systems Do Brasil Ltda.
Advanced Elastomer Systems Japan Limited
Advanced Elastomer Systems Limited
Advanced Elastomer Systems Marketing Pte. Ltd.
Advanced Elastomer Systems NV/SA
Advanced Elastomer Systems Singapore Pte. Ltd.
Advanced Elastomer Systems, Canada, Inc.
Advanced Elastomer Systems, Inc.
Advanced Elastomer Systems, L.P.
Air Tankdienst Koeln GbR
Aircraft Fuel Supply B. V.
Al-Jubail Petrochemical Company
Alberta Products Pipe Line Ltd.
Alyeska Pipeline Service Company
AquaAir Environmental, Inc.
Aramco Services Company
Asakawa Sekiyu K.K.
Awaji Gas Nenryo Kabushiki Kaisha
Azuma Sekiyu K.K.
B.W.O.C., Inc.
BEB Erdgas und Erdoel GmbH, Hannover
BRIGITTA Erdgas und Erdoel GmbH, Hannover
Bangkok Aviation Fuel Services Limited
Banshu Ekika Gas K.K.
Bayerische Erdoelleitung G.m.b.H.

Beaverhill Resources Limited
Brickwood Holdings Pty. Ltd.
Bryan Austin Chalk Operating Committee, Inc.
Bryan Woodbine Gathering, Inc.
Canadian Reserve Oil & Gas Ltd.
Cascade Fertilizers (1990) Limited
Castle Peak Power Company Limited
CeraMem Separations, Inc.
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Changi Into-Plane Services (Pte) Ltd.
Chuo Sekiyu Hanbai K.K.
Comcor Chemicals Limited
Compagnie Industrielle des Polyethylenes de Normandie, GIE
Compania Minera Disputada de Las Condes S.A.
Comptoir Auxiliaire du Petrole
Comptoir Oyonnaxien des Combustibles (C.O.C.)
Computer Centrum Groningen B.V.
Copim St. Lawrence Ltd.
Cynthia Gas Gathering Company Limited
DFTG Deutsche Fluessigerdgas Terminal GmbH
Daihatsu Sekiyu K.K.
Daito Gas K.K.
Depot Petrolier du Gresivaudan
Depots Petroliers de la Corse
Depots de Petrole Cotiers
Deudan-Holding GmbH
Deutsche Advanced Elastomer Systems GmbH
Deutsche Erdgas Transport G.m.b.H.
Deutsche Transalpine Oelleitung G.m.b.H.
Devons Estates Limited
Disma S.r.l.
Dixie Pipeline Company
Dunbar Oil Ltd.
E S F Limited
ETD Tankdienst Gesellschaft Duesseldorf GbR
Eagle Kenso K.K.

Eagle Reinsurance Co. Ltd.
East Texas Salt Water Disposal Company
Eiko Sekiyu K.K.
Elwerath Erdgas und Erdoel GmbH, Hannover
Elwerath Erdoel und Erdgas AG
Emirates National Chemicals Company Ltd.
Emori Sekiyu K.K.
Emsland-Erdoelleitung G.m.b.H.
Emulsions de Feyzin
Emulsions du Dauphine
Energie Marketing Service GmbH
Enterprise Housing Partners 1992 Limited Partnership
Entrepot Petrolier de Mulhouse (E.P.M.)
Entrepot Petrolier de l'Aveyron (E.P.A.)
Erdgas-Verkaufs-Gesellschaft m.b.H.
Erdoel-Raffinerie Deurag-Nerag GmbH
Esso (Overseas) Pension Trust Limited
Esso Energie G.I.E.
Esso Exploration and Production Angola Inc.
Esso Exploration and Production Ireland Limited
Esso Lub'Services
Esso Malaysia Berhad
Esso Raffinage S.A.F.
Esso Societe Anonyme Francaise
Esso Standard Thailand Ltd.
Esso Standard Tunisie S. A.
Esso Technologies et Services (E.T.S.)
Esso Yukong Specialties Ltd.
Etablissements Cloarec
Exxon Asset Funding Company
Exxon Asset Management Company
Exxon Chemical Asset Management Partnership
Exxon Chemical France
Exxon Chemical Paraffins Limited
Exxon Chemical Polymeres SNC
Exxon Mobile Bay Partnership
Exxon de Colombia S.A.
F.T. Giken Kabushiki Kaisha

Federated Pipe Lines Ltd.
Ferngas Nordbayern G.m.b.H.
Ferngas Salzgitter GmbH
Fernkaelte Geschaeftsstadt Nord G.b.R.
Flughafen Schwechat Hydranten-Gesellschaft
Fuji Kogyo K.K.
Full Cycle Plastics Pty. Ltd.
G16a (Groep) B.V.
Gasunie Engineering B.V.
Gasunie Warmte/Kracht Emmen B.V.
General Bussan K.K.
General Highway K.K.
General Petrochemical Industries Limited
General Sekiyu K.K.
General Sekiyu Okinawa Hanbai K.K.
General Sekiyu Overseas, Ltd.
General Shipping Co. Ltd.
General Unyu Kabushiki Kaisha
Geobutane—Lavera
Ges. fur Mineraloelveredlung und Distribution Rhaesa mbH
Gewerkschaft Brassert Erdoel und Erdgas GmbH
Gewerkschaft Gute Hoffnung Erdgas und Erdoel GmbH
Gewerkschaft Kuechenberg Erdgas und Erdoel GmbH
Glen Park Gas Pipe Line Company Limited
Grande Ecaille Land Company, Inc.
Groupement Immobilier Petrolier
Groupement Petrolier Aviation
Groupement Petrolier de Nantes (G.P.N.)
Groupement Petrolier de Saint-Pierre des Corps (G.P.S.P.C.)
Groupement Petrolier de la Cote d'Azur
Groupement Petrolier du Finistere G.I.E.
Groupement Petrolier du Val-de-Marne (G.P.V.M.)
Groupement d'Exploitation du Depot de Reception de Chennevie
Hambrecht & Quist Environmental Technology
Hamburger Gaswerke GmbH

Hannoversche Erdoelleitungs-G.m.b.H.
Hanshin Kyowa Sekiyu K.K.
Heinrich Schneider Spedition GmbH
Hiroshima General Gas Juten Kabushiki Kaisha
Hoei Sekiyu K.K.
Hokkai Sanshi Co., Ltd. (Chemical)
Hokushin Bussan K.K.
Hokuyu Sekiyu K.K.
Hong Kong Pumped Storage Development Company, Limited
Houston Regional Monitoring Corporation
Hydrant Refuelling System, S.A.
Hydranten-Betriebs-Gesellschaft, G.b.R.
Hydrierwerke Poelitz Aktiengesellschaft
Imperial Oil (an Ontario General Partnership)
Imperial Oil Limited
Imperial Oil Resources Limited
Imperial Oil Resources N.W.T. Limited
Imperial Oil Resources Ventures Limited
Imperial Oil Resources an Alberta limited partnership
Industria Acqua Siracusana S.p.A.
Industry Promotion Enterprises Limited
Iranian Oil Participants Limited (Iranian Consortium)
Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Iraq Petroleum Pensions, Limited
Japan Butyl Company Limited
Jaymo SNC
Jersey Nuclear-Avco Isotopes, Inc.
K. K. Momose Shiojiri Stand
K. K. Toresen
K.K. Aizu General
K.K. Auto
K.K. Daimaru
K.K. Eastern Gas Terminal
K.K.General Sekiyu Hanbaisho
K.K. Genet
K.K. Genetech

K.K. Genex
K.K. Heian Sekiyu
K.K. Kyoei Shosha
K.K. Marugo Izumasa Shoten
K.K. Marutaka Sekiyu
K.K. Momose Sekiyu
K.K. Standard Sekiyu Osaka Hatsubaisho
K.K. Toko
K.K. Uwano Sekiyu Shokai
K/S Statfjord Transport A/S & Co.
KX Industries, L.P.
Kabushiki Kaisha Sankyo Plastics
Kabushiki Kaisha Serubisu
Kai Tak Refuellers Company Limited
Kansai Chuo Sekiyu K.K.
Kanto Kygnus K.K.
Karlsruhe-Stuttgart Rohrleitung Gesellschaft mbH
Kawasaki Kygnus Sekiyu Hambai Kabushiki Kaisha
Keiyo Sekiyu Hanbai K.K.
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Kemcor Elastomers Ltd.
Kemcor Olefins Ltd.
Kemcor Plastics Pty. Ltd.
Kenya Petroleum Refineries Limited
Kibo Sekiyu Hanbai K.K.
Kimura Sekiyu Kabushiki Kaisha
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Kowa Sekiyu K.K.
Kowloon Electricity Supply Company Limited
Kumho E.P. Rubber Co., Ltd.
Kygnus Ekika Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Sekiyu K. K.
Kygnus Sekiyu Seisei Kabushiki Kaisha
Kygnus Trading Kabushiki Kaisha

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L-Net East K.K.
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Liants Routiers du Gard (L.R.G.)
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Lily Sekiyu K.K.
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Lithcon Petroleum Taiwan Inc.
Long Beach Oil Development Company
MEGAL FINCO
MEGAL GmbH
Maasvlakte Olie Terminal C.V.
Maasvlakte Olie Terminal N.V.
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Manchester Airport Storage and Hydrant Company Limited
McCann Plastics Inc. (Chemical)
McColl-Frontenac Inc.
McColl-Frontenac Petroleum Inc./Petroliere McColl-Frontenac
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Mikawa Bussan K.K.
Mitake Unso K.K.
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NAM - K 14 B.V.
NAM - K 15 B.V.
NAM - K 7 B.V.
NAM-K17 B.V.
NAM/CLOMS - K 8/K 11 B.V.
NAM/CLOMS - L 13 B.V.
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Yashaka Sekiyu K.K.
Yellowstone Pipe Line Company
Yoshimi Gas Kabushiki Kaisha
Yuai Sekiyu K.K.
Zenon Environmental Systems Inc. (ZESI)

(3)

Supreme Court, U.S.
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No. 95-1637

In The

Supreme Court of the United States

October Term, 1995

SEARIVER MARITIME, INC.,

Petitioner,

v.

EXXON SEAMEN'S UNION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER STATEMENT OF THE CASE

A. Background

The Exxon Seamen's Union (hereinafter referred to as the "union") is, and has been, the collective bargaining representative of the unlicensed personnel employed in the deck, engine and steward's departments of the Exxon Shipping Company (hereinafter referred to as the "company" or "Exxon").

The company and the union were parties to a collective bargaining agreement covering the period of July 31, 1985 through August 31, 1987.

After eight months of unsuccessful negotiations, effective April 1, 1988, the company implemented its final proposal. The discipline clause of the 1985-1987 agreement was continued in full force and effect. Pursuant thereto, an employee could only be discharged for "cause", which was interpreted to mean "just cause". The parties' grievance and arbitration agreement was also continued in full force and effect.

On April 1, 1988, the company unilaterally implemented a drug and alcohol testing policy. On April 1, 1988, the company issued a Policy Statement on Employee Alcohol and Drug Use. That policy contained a provision regarding "reasonable cause" testing. That policy provided in relevant part:

> The company also has the right to require employees to submit to medical evaluation or alcohol or drug testing where cause exists to suspect alcohol or drug misuse. A positive test result or refusal to submit to a drug test is

> grounds for disciplinary action, including dismissal.

(App. 66a).

By letter dated September 27, 1988, the company notified the employees of its intent to strictly enforce the above policy. The company, despite this letter, did not change its policy statement which implied that discharge was not mandatory for a refusal to submit to a drug test and did not change the contractual requirement that any discipline was subject to the "just cause" provision.

B. Alan Cash's Grievance

The grievant in this case is Alan Cash, who was a pumpman employed for thirteen (13) years with Exxon. In early May of 1989, Mr. Cash was transferred from the oil-tanker Exxon Benicia in Japan to the oil-tanker Exxon Washington anchored in San Francisco Bay. From May 10, 1989 to May 15, 1989, Mr. Cash was quartered in the second pumpman's room – a small, poorly furnished room. Mr. Cash was working around the clock to get the ship fit for sea.

On May 15, 1989, the chief pumpman left the Exxon Washington due to a family emergency. Mr. Cash moved into that room. The chief pumpman's room was not cleaned before Mr. Cash moved in. Due to fire safety rules, the room door was always left unlocked.

On May 17, 1989, the company conducted an unannounced search of the Exxon Washington. During that search, in the chief pumpman's cabin, the search team found several marijuana seeds on and under the rug, an

ash by the bedpost, and two little balled up pieces of paper which turned out to be marijuana cigarette ends ("roaches") in the pouch of a suitcase used by Mr. Cash.

Based upon these findings, the company ordered the grievant to submit to a drug test. The union had consistently contested the drug and alcohol policy, and on the advice of the union representative, the grievant refused to submit to a drug test. Mr. Cash was discharged. Mr. Cash's discharge was grieved. The parties were unable to resolve the grievance, thus the matter was submitted to arbitration.

C. The Arbitration Proceeding

After three days of hearing, and the submission of post-hearing briefs, the neutral arbitrator issued an Opinion and Award dated November 27, 1992. (App. 35a). The union-designated arbitrator concurred with the Opinion and Award; the employer-designated arbitrator dissented. (App. 63a, 64a).

The arbitrator found that the discharge of Mr. Cash was not for just cause. (App. 63a). The arbitrator found that Mr. Cash did not have possession of the controlled substance scattered in his room. (App. 60a, 61a). Thus, the arbitrator concluded that there was no "cause", "reasonable cause", "probable cause" or "just cause" to order Mr. Cash to submit to a drug test. (App. 61a). In finding that there was no cause to order Mr. Cash to submit to a drug test, the arbitrator made note of certain material facts such as: Mr. Cash was only in the room 1 1/2 days prior to the search and only for a few hours daily (App. 59a); the cabin had not been cleaned before Mr. Cash

moved in (App. 59a); other persons had full access to the room because the door was unlocked (App. 59a); the room had been previously occupied (App. 59a); the materials discovered were scattered around the room which would lead a reasonable person to the conclusion that the materials belonged to someone else (App. 59a-60a); and the arbitrator took note of a prior arbitration award wherein an employee who was discharged for refusal to submit to a drug test after a search disclosed a marijuana roach and an alligator clip, was reinstated without pay because there was doubt as to whether the grievant possessed the material found. (App. 41a, 42a). The arbitrator ordered that Mr. Cash be reinstated with full seniority but the period of his discharge was to be deemed a disciplinary suspension without pay. (App. 63a).

D. Post-Arbitration Proceedings

Exxon moved to vacate the arbitration award and the union moved to confirm same. By Opinion and Order dated December 8, 1994, the District Court confirmed the arbitration award. (App. 23a-34a).

Exxon filed an appeal. In an Opinion filed January 11, 1996, the Court of Appeals for the Third Circuit affirmed the decision of the District Court. (App. 1a).

REASONS FOR DENYING THE WRIT

I. PUBLIC POLICY WAS NOT VIOLATED BY CONFIRMATION OF AN ARBITRATION AWARD WHEREIN THE ARBITRATOR DETERMINED THAT THE EMPLOYER DID NOT HAVE REASONABLE CAUSE TO REQUIRE THE GRIEVANT TO SUBMIT TO A DRUG TEST AND THE EMPLOYER DID NOT HAVE JUST CAUSE TO DISCHARGE THE GRIEVANT.

Pursuant to the collective bargaining agreement, and the issue submitted to the arbitrator, the grievant, Alan Cash, could only be discharged by Exxon for "just cause".

The arbitrator determined that Exxon did not have just cause to discharge Mr. Cash. As part of the award, the arbitrator found that the grievant did not have possession of a controlled substance, thus the company did not have reasonable cause to require Mr. Cash to submit to a drug test. (App. 61a-63a). The District Court below confirmed the arbitration award and the Court of Appeals for the Third Circuit affirmed that decision. The well-reasoned decision of the Third Circuit follows established labor arbitration case precedent.

The Petitioner contends that this Court should grant the writ of certiorari because the court below erred by not vacating the arbitration award on public policy grounds. The Petitioner postures that the confirmation of the arbitration award and the reinstatement of the grievant will cause an environmental catastrophe (Pet. 9). The Petition is replete with misstatements of fact and law. The Petition does not require this Court to resolve any unsettled questions of Federal law or conflicting decisions of this Court. The Petition should therefore be denied.

A. The Court below gave due deference to the arbitrator's determination.

Courts exercise very limited review of an arbitration award issued pursuant to a collective bargaining agreement. *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 36-38, 108 S. Ct. 364, 369-70, 98 L. Ed. 2d 286 (1987) ("*Misco*"); *Exxon Shipping Company v. Exxon Seamen's Union*, 73 F.3d 1287, 1291 (3d Cir. 1996) ("*Exxon III*"). As this Court has observed, "[t]he federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards". *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596, 80 S. Ct. 1358, 1360, 4 L. Ed. 2d 1424 (1960) ("*Enterprise Wheel*"), *accord*, *Exxon III*, 73 F.3d at 1291. Accordingly, courts are not authorized to reconsider the merits of an arbitration award. *Misco*, 484 U.S. at 36, 108 S. Ct. at 370; *Enterprise Wheel*, 363 U.S. at 596, 80 S. Ct. at 1360. A court may not reconsider the merits of an award even when the parties allege that the award rests on errors of fact and/or errors of law. *See, United Industrial Workers v. Government of Virgin Islands*, 987 F.2d 162, 170 (3d Cir. 1993); *Interstate Brands Corp. v. Teamsters Local Union No. 135*, 909 F.2d 885, 888 (6th Cir. 1990), *cert. denied*, 499 U.S. 885, 111 S. Ct. 1104, 113 L. Ed. 2d 214 (1991).

The parties have authorized the arbitrator to give meaning to the language of the agreement. *Jeddo-Highland Coal Company v. District 2, United Mine Workers of America*, 884 F. Supp. 926, 936 (M.D. Pa. 1995). It is the job of the arbitrator to interpret and apply the terms of the parties' collective bargaining agreement. *Enterprise Wheel*, 363

U.S. at 597, 80 S. Ct. at 136. As long as the arbitrator's award "draws its essence from the collective bargaining agreement and is not merely the arbitrator's own brand of industrial justice", the court must enforce the award. *Enterprise Wheel*, 363 U.S. at 597, 80 S. Ct. at 1361.

Pursuant to the terms of the collective bargaining agreement in effect, an employee could only be discharged or disciplined for "cause", which had been interpreted to mean "just cause". The agreement does not define that phrase. Thus, when the parties submit to the arbitrator the question of whether the grievant was discharged for "just cause", the arbitrator is required to decide what "just cause" means. *United Transportation Union Local 1589 v. Suburban Transit Corp.*, 51 F.3d 376, 380 (3d Cir. 1995). The arbitrator must apply all the surrounding facts and circumstances to his interpretation of the agreement to determine whether or not the discharge was proper. *Arco-Polymers, Inc. v. Local 8-74*, 671 F.2d 752, 756 (3d Cir.), *cert. denied*, 459 U.S. 28, 103 S. Ct. 63, 74 L. Ed. 2d 65 (1982). A highly deferential standard of review is commonly extended to the substantive issue of what constitutes sufficient and reasonable cause for discharge. *Interstate Brands*, 909 F.2d at 889 (citations omitted).

Generally, in a discharge arbitration case, the employer will assert that the employee has engaged in conduct which is violative of a specific company rule or policy, and that said conduct was cause to discharge the employee. The operation of a company rule may be at odds with the "just cause" provision. In such cases, harmonizing discordant provisions is clearly a matter for the arbitrator and is well within his authority. *Local 238 International Brotherhood of Teamsters, Chauffeurs, Warehousemen*

and Helpers v. Cargill, Inc., 66 F.3d 988, 990 (8th Cir. 1995) (citations omitted); *Arco Polymers*, 671 F.2d at 756.

In *Arco Polymers, supra*, a company rule stated that an employee would be subject to discharge if he/she were absent for more than four days without good and sufficient cause. 671 F.2d at 752. The collective bargaining agreement between the union and Arco Polymers also contained a "just cause" for discharge provision. The grievant was discharged for being absent for 19 days without good and sufficient cause. The arbitrator found that the grievant was unjustly discharged. *Id.* at 752. The District Court vacated the award. The Third Circuit reversed.

Upon review, the Third Circuit noted that the rule did not give the company unfettered discretion to discharge without being subject to review under the "just cause" provision. *Id.* at 756. Moreover, the language of the rule – "shall be subject to discharge" – was interpreted by the arbitrator to mean that discharge was not mandatory. *Id; accord, Super Tire Engineering Company v. Teamsters Local Union No. 676*, 721 F.2d 121, 124-125 (3d Cir. 1983), *cert. denied*, 469 U.S. 817, 105 S. Ct. 83, 83 L. Ed. 2d 31 (1984).

In a discharge case involving the "just cause" provision and allegations of the violation of a company rule, not only is the arbitrator interpreting the "just cause" provision, but he/she is also required to interpret the rule. *See, General Drivers, Warehousemen and Helpers Local Union 968 v. Sysco Food Services, Inc.*, 838 F.2d 794, 798 (5th Cir. 1988). In *Sysco Food Services*, the grievant was accused of insubordination. In analyzing whether the grievant

violated the company's rule on insubordination, the arbitrator had to determine whether the disciplined employee engaged in the specific conduct which resulted in the disciplinary action. *Id.* at 798. In order for an arbitrator to find "just cause" to discharge an employee, the employer must prove that the grievant engaged in conduct violative of the elements of the offense charged. Once the arbitrator finds that the grievant did not engage in conduct violative of the rule, and that there is no just cause to discharge the grievant, then the arbitrator has the authority to fashion the appropriate remedy. *Id.* at 799; *see, Cargill, Inc.*, 66 F.3d at 99. The judicial deference to an arbitrator's award extends to the remedy awarded. *See, Enterprise Wheel*, 363 U.S. at 597, 80 S. Ct. at 1361; *accord, General Teamsters Local 326 v. M & G Convoy, Inc.*, 848 F. Supp. 513, 517 (D. Del. 1994).

This case follows the above-cited established case precedent. The bargaining unit employees could only be discharged for "just cause". The policy unilaterally implemented by the company indicated that the company could require an employee to submit to a drug or alcohol test "where cause exists to suspect alcohol or drug misuse". (App. 66a). The rule went on to indicate that a "refusal to submit to a drug test was grounds for disciplinary action, including discharge". (App. 66a). Thus, discharge was not made mandatory.

On September 27, 1988, the company issued a letter which reiterated the above policy. (App. 67a). The letter indicated that a violation of the policy "will result in immediate termination". (App. 71a). However, the letter also indicated that each incident would be reviewed on a "case by case" basis. (App. 71a).

The above letter did not constitute an amendment to the official promulgated policy. Instead, the letter was an indication of how the company would interpret the policy.

It is reasonable to interpret the policy and the letter to allow a penalty lesser than a discharge. Any discipline under the policy remains subject to the just cause provision. The stipulated issue submitted to the arbitrator, i.e., was Mr. Cash discharged for just cause, shows that Exxon did not think the discharge under the policy was "strictly a function of management". *See, Cargill, Inc.*, 66 F.3d at 990.

In order for the arbitrator to find "just cause" to sustain the grievant's discharge, the company had to prove that it had "reasonable cause" or "just cause" to require the grievant to submit to a drug test. To prove "reasonable cause", the company had to present facts to support a reasonable suspicion that the grievant had either used or had possession of drugs. Since the charge of use or possession of drugs is a criminal offense, arbitrators have required the employer to prove their case by clear and convincing evidence, or beyond a reasonable doubt. Elkouri & Elkouri, *How Arbitration Works*, Fourth Edition, page 662-663 (BNA 1985); *Graphic Communications International Union Local 121-C v. Southern Coupon, Inc.*, 852 F. Supp. 970, 975 (N.D. Ala. 1993). Upon a review of all of the facts and circumstances of this case, and in light of a prior Exxon arbitration award wherein the arbitrator found that the company did have reasonable cause to test the grievants, the arbitrator in this case determined that the company did not carry its burden of proof – that there was no reasonable cause to require the

grievant to submit to a drug test – thus there was no just cause to discharge him. Since the arbitrator's award draws its essence from the collective bargaining agreement, the courts below confirmed the award.

The decision of the court below is not an aberration. There are several cases analogous to this case.

In *Misco*, the company promulgated a rule which indicated that possession or use of a controlled substance on company property was grounds for discharge. 484 U.S. at 32, 108 S. Ct. at 368. The grievant was apprehended by police sitting in the back seat of a car in the company parking lot with marijuana smoke in the air and a lighted marijuana cigarette in the frontseat ashtray. 484 U.S. at 33, 108 S. Ct. at 368. The employee was discharged due to possession of drugs on company premises. *Id.*

The issue submitted to the arbitrator was whether there was just cause to discharge under the company rule. *Id.*

The arbitrator found that there was no just cause to discharge the grievant. 484 U.S. at 34, 108 S. Ct. at 368. The arbitrator found that the company failed to prove that the grievant had possessed or used marijuana on company property; finding the grievant in the backseat of a car with a burning marijuana cigarette in the frontseat ashtray was insufficient proof that the grievant had used or possessed drugs on company property. *Id.*; *also see, Bechtel Construction, Inc. v. Laborers' District Council*, 130 LRRM (BNA) 2749 (E.D. Pa.), *aff'd*, 865 F.2d 249 (3d Cir. 1988), *cert. denied*, 489 U.S. 1017, 109 S. Ct. 1133, 103 L. Ed. 2d 194 (1989).

In *Cargill, Inc., supra,* as in this case, the company promulgated a drug and alcohol policy which included reasonable suspicion testing. 66 F.3d at 989. The policy indicated that an employee refusing a test would be considered in violation of the policy and "will be terminated". *Id.* at 990. Disciplinary action taken pursuant to the policy remained subject to the "just cause" provision. *Id.*

The grievant was discharged because of his refusal to submit to a drug and alcohol test. *Id.* at 988. The arbitrator found that the grievant had consumed alcohol on the job, and knowingly and willfully refused to submit to the test. *Id.* at 989. Nonetheless, the arbitrator found that the company did not have sufficient cause to discharge the grievant, and instead ordered a disciplinary suspension as part of a "last chance offer of reemployment in lieu of discharge". *Id.* The court confirmed the arbitration award. The court found that the arbitrator was within his authority to harmonize the drug and alcohol testing policy and the just cause provision. *Id.* at 990. Thus, upon finding that there was no just cause for discharge, the arbitrator was within his authority to order a last chance remedial award.

In *Trinity Industries v. United Steelworkers of America,* 891 F. Supp. 342 (N.D. Tex. 1995), the company had a drug and alcohol policy wherein the company could require an employee to submit to a test. *Id.* at 345. A supervisor caught two welders in a vacant building and he detected the smell of marijuana smoke. *Id.* at 343. The supervisor ordered the two employees to submit to a drug test, but they refused and were discharged.

The issue submitted to the arbitrator was whether there was just cause for discharge. The court upheld the arbitrator's decision that the grievants were denied certain due process rights, and thus held there was no just cause for discharge. The arbitrator converted the discharge to a disciplinary suspension without pay which is the same remedy the arbitrator ordered in this case. *Also see, United Food and Commercial Workers International Union, Local 588 v. Foster Poultry Farms,* 151 LRRM (BNA) 2013 (9th Cir. 1995) (The Ninth Circuit confirmed an arbitration award wherein a driver who was discharged for his refusal to take a random drug test required under Department of Transportation regulations was ordered reinstated).

B. The Arbitration Award does not violate public policy.

It is well settled that a court may not enforce a collective bargaining agreement or an arbitration award that is contrary to public policy. *See, W.R. Grace & Co. v. Local Union 759,* 461 U.S. 757, 765-66, 103 S. Ct. 2177, 2183, 76 L. Ed. 2d 298 (1983). Such public policy must be an explicit, well-defined and dominant public policy, which is to be ascertained by reference to the laws and legal precedents. *Id., quoting, Muschany v. United States,* 324 U.S. 49, 66, 65 S. Ct. 442, 451, 89 L. Ed. 744 (1945); *accord, Misco,* 484 U.S. at 43, 108 S. Ct. at 373-74. General considerations of supposed public policy do not trigger the public policy exception. *Foster Poultry Farms,* 151 LRRM at 2016 (citations omitted). The party seeking to vacate an arbitration award bears the burden of showing that the award violates an explicit well-defined and dominant

public policy, and it must demonstrate that the policy is one that specifically militates against the relief ordered by the arbitrator. *Id.* (citations omitted). The courts have been and should be reluctant to vacate an arbitral award on public policy grounds – there is no broad judicial power to set aside arbitration awards as against public policy. *Id., citing, Arizona Electric Power Cooperative, Inc. v. Berkeley*, 59 F.3d 990, 992 (9th Cir. 1995), *citing, Misco*, 484 U.S. at 43, 108 S. Ct. at 373.

Throughout all of the proceedings below, Exxon has argued that Mr. Cash's refusal to submit to a drug test constitutes a violation of the Coast Guard Regulations, specifically 46 C.F.R. 16.250. (App. 77a). Exxon continues to argue that the arbitrator's award reinstating Mr. Cash violates public policy because said award is violative of the above-cited Coast Guard regulation and also the policy underlying the regulation and several other statutes. Exxon's public policy argument is erroneous for a number of reasons which will be discussed in turn.

When the public policy exception is raised, the Court must accept the arbitrator's findings of fact. *Misco*, 484 U.S. at 45, 108 S. Ct. at 374; *Exxon Shipping Company v. Exxon Seamen's Union*, 993 F.2d 357, 360 (3d Cir. 1993); *Iowa Electric Light and Power Company v. Local Union 204, International Brotherhood of Electrical Workers*, 834 F.2d 1424, 1427 (9th Cir. 1987). The arbitrator in the case at bar specifically found that Mr. Cash did not use nor had possession of the marijuana gleanings discovered in the chief pumpman's cabin. The arbitrator also determined that Exxon did not have reasonable cause to require Mr. Cash to submit to a drug test. In light of the above

findings of fact, the Coast Guard's reasonable cause testing provision is not implicated. Exxon did not have reasonable cause to require Mr. Cash to submit to a drug test under 46 C.F.R. 16.250.

As part of its presentation, Exxon submitted to the arbitrator the Coast Guard drug testing regulations. Exxon argued that it had reasonable cause to test and discharge Mr. Cash pursuant to the Coast Guard regulations. The arbitrator stated:

> If there was no reasonable cause to conclude that the grievant brought the drug into his cabin – and the above analysis finds that there was not – then the Coast Guard regulations would not call for a drug test, and no violation of the regulations could be said to exist.

(App. 60a). Although this finding is beyond the scope of the parties' agreement, since Exxon argued the statutory effect, Exxon should be held bound by the arbitrator's findings.

Regardless of the arbitrator's decision, the Coast Guard's reasonable cause testing regulation does not specifically militate against the arbitrator's reinstatement order for Mr. Cash.

The Coast Guard regulation regarding reasonable cause testing, indicates that an employee may be required to submit to a test when the employer has a reasonable belief that the grievant had used drugs. In this case, there was no indication of use or probable use of drugs by Mr. Cash so there was no reasonable cause to require him to submit to a drug test.

When the Coast Guard promulgated its regulations, it was very specific about penalties. If an employee refuses to take a drug test after a serious marine accident, or if an employee tests positive for drugs, according to the regulations, the employee must be immediately relieved of all duties on the ship and he/she is subject to having his/her license suspended or revoked. 46 C.F.R. Sections 4.06-5(c) and 16.201(c) and (d), and 53 Fed. Reg. 47072. If an employee refuses a random drug test, he/she may not be employed. 46 C.F.R. Section 16.230(f).

Pursuant to the Coast Guard's reasonable cause testing provision, 46 C.F.R. Section 16.250, an employee who refuses to take a reasonable cause test is not discharged from employment nor removed from his/her duties on the ship. Other Federal regulatory agencies have adopted provisions that indicate that a refusal to take a test is to be treated the same as a positive test. (Pet. 11-12). The Coast Guard has not promulgated such a regulation. The only penalty an employee will receive under the Coast Guard's regulations for refusing to take a reasonable cause drug test is that he/she will have his/her name placed in the vessel's official log book, if such a book is required. 46 C.F.R. 16.250(c). (App. 77a, 80a). Thus, the arbitrator's reinstatement order of Mr. Cash is not violative of the Coast Guard's regulations. *See, Foster Poultry Farms*, 151 LRRM at 2016-17.

Exxon argues that the decision of the court below is contrary to recent public policy case precedent involving the reinstatement of employees in safety sensitive positions. (Pet. 10-11). In each of the cases cited, the employee was in a safety sensitive position. In each of the cases cited, evidence showed that the employee was under the

influence of drugs or alcohol while at work, but based upon other considerations, the arbitrator found no just cause for discharge. In all of the cases, the employees' conduct violated a company policy, and in most a specific positive law.

This case is clearly distinguishable. In this case, the grievant was admittedly not under the influence of drugs or alcohol at work. Second, the arbitrator did not find the grievant guilty of a violation of the company policy. There is no violation of a positive law or policy underlying same.

Exxon argues that the effect of the decision of the court below is contrary to the public policy of a drug-free workplace. (Pet. 10). Exxon further contends that the decision below will "measurably increase the likelihood of tanker accidents and decrease tanker safety" (Pet. 9). While it is admitted that avoiding an environmental accident is of utmost importance, an arbitration award (this arbitration award) should not be vacated on public policy grounds based on "general considerations of supposed public interest". *W.R. Grace*, 461 U.S. at 766, 103 S. Ct. at 2183; *Foster Poultry Farms, supra.*

Exxon has expressed a concern about the negative precedent established by the decision below. That decision need not be reversed to address that concern. Instead, Exxon can and has addressed its concerns about drug testing through the collective bargaining process. *Exxon Shipping Company*, 993 F.2d at 360, n.3.

Exxon has filed its Petition for a Writ of Certiorari to reverse the decision of the Third Circuit and vacate the arbitration award dated November 27, 1992. Exxon's

argument is premised on an alleged violation of public policy. However, in light of the Arbitrator's finding that Mr. Cash did not use or possess a controlled substance, and there was no reasonable cause to require Mr. Cash to submit to a drug test, Exxon has failed to show that the arbitrator's reinstatement order violates any positive law, or any explicit, well-defined, dominant public policy. This case is specific on its facts, so there is no likelihood of a repeat case. The perceived tarnish to Exxon's image from the decision should not be grounds for a grant of Exxon's Petition for Writ of Certiorari.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: May 10, 1996

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SEARIVER MARITIME, INC.,
Petitioner,
v.
EXXON SEAMEN'S UNION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR AMICUS CURIAE, INSTITUTE FOR A DRUG-FREE WORKPLACE, IN SUPPORT OF PETITIONER

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37.2 of this Court, the Institute for a Drug-Free Workplace ("the Institute"), by its undersigned counsel, hereby moves for leave to file its brief as an *amicus curiae* in support of Petitioner, SeaRiver Maritime.* In support of its Motion, the Institute states:

The Institute is a non-profit coalition of private businesses and business organizations dedicated to preserving the interests of employers and employees in effective and responsible drug-abuse prevention programs. In this regard, the Institute disseminates information to assist in the development of corporate drug-abuse prevention and treatment programs, and attempts to positively influence

*** Prior to filing this Motion, the Institute sought the consent of both parties to the filing of its brief, as required by the Court's rules. The Petitioner consented to the Institute's request, but the Respondent refused consent, necessitating this motion.**

the development of the law on workplace substance-abuse prevention throughout the United States. The Institute has developed an enormous amount of information on current laws, regulations, policies, and workplace practices regarding substance-abuse prevention. In addition, the Institute has extensive resources on the successes and failures of workplace substance-abuse programs and what measures have proven effective.

The Institute believes that its *amicus curiae* participation will benefit the Court in this proceeding. The Institute and its members bring a unique "hands-on" perspective to the consideration of the efficacy and value of meaningful drug-testing programs. Its members have implemented such policies and applied them to sizable portions of the nation's work force and, thus, have substantial experience with the benefits of effective programs. Accordingly, the Institute and its members have an important perspective on the critical policy issues involved in this case which the Court should consider.

WHEREFORE, the Institute requests that the Court grant its motion and permit it to file the accompanying brief as an *amicus curiae*, in support of the Petitioner.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE, INSTITUTE FOR A DRUG-FREE WORKPLACE, IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS

The Institute for a Drug-Free Workplace (the "Institute") is a non-profit coalition of major businesses and business organizations dedicated to preserving the interests of employers and employees in effective and responsible drug-abuse prevention programs. The Institute includes in its membership six of the ten largest companies in the United States, nearly half of the "Fortune 50," approximately 70 of the "Fortune 200," and a wide range of chambers of commerce, trade associations, and community coalitions representing businesses of all sizes.

Among other functions, the Institute disseminates information intended to assist employers and employees in corporate drug-abuse prevention and treatment programs, and to positively influence the national, state, and local consideration of drug-abuse prevention issues. The Institute, therefore, is uniquely situated to provide relevant and helpful information on the nature and dangers of alcohol and drug abuse, and on the design and implementation of effective policies and procedures to combat those problems in the workplace, particularly where such policies promote the safety and welfare of employees, co-workers, and the public at large.

The Institute has a significant interest in the questions presented in this case. By holding that an employer may be required to return an employee suspected of illicit drug abuse to a safety-sensitive position after he refused to submit to a requested drug test, the Court of Appeals ignored the risk that such an employee could cause or contribute to an accident, and the potentially catastrophic consequences. The decision therefore unfairly limits employers' ability to provide a safe workplace, and to take steps to protect life, property, and the environment.

The Institute's members have a strong interest in ensuring that their drug-free workplace policies cannot be evaded by employees who refuse to submit to a drug test without consequence. Mandatory reinstatement of a safety-sensitive employee legitimately suspected of drug abuse who refuses to submit to testing—if left undisturbed by this Court—would provide a "road map" to illicit drug users on the best strategy to avoid the employment ramifications of improper and dangerous conduct.

Moreover, such a policy would give drug abusers an escape hatch from enforcement of company drug-free workplace policies, would undermine the very basis of these policies, and—by putting those known or strongly suspected of being drug abusers back in critically safety-sensitive jobs—could directly and substantially precipitate human, economic, and environmental catastrophes.

INTRODUCTION AND SUMMARY

The Institute agrees with the Petitioner that the Third Circuit's decision to uphold the arbitrator's award reinstating Alan Cash violates the well-established public policy against allowing drug-impaired employees to work in safety-sensitive positions. That public policy—grounded in concerns relating to public, environmental, and workplace safety—is of overriding importance, and requires that the Court of Appeals' decision be reversed.

Petitioner's employee, Mr. Cash, worked as a pumpman on an ocean-going oil tanker, which is a safety-sensitive position subject to drug testing under both U.S. Coast Guard and Petitioner's rules. He refused to submit to a drug test after an inspection revealed evidence of marijuana in his room and suitcase. *Exxon Shipping Co. v. Exxon Seamen's Union*, 73 F.3d 1287, 1289-90 (3d Cir. 1996) (Exxon III). Mr. Cash was terminated for failure to submit to the requested test, but ordered reinstated by an arbitration panel which, using a "clear and convincing evidence" standard, found that Petitioner did not have sufficient cause to require a drug test. *Id.* at 1290. Petitioner filed an appeal from this award in the U.S. District Court for the District of New Jersey, which affirmed and enforced the arbitration ruling. Petitioner appealed that decision to the United States Court of Appeals for the Third Circuit, which affirmed the District Court's decision.

Significantly, the Court of Appeals *agreed* with Petitioner that reinstatement of an employee who refuses to submit to a drug test upon a showing of reasonable cause violates public policy. *Id.* at 1295. Nevertheless, the court refused to overturn the arbitrators' decision, noting the conflicting policy in favor of judicial deference to arbitration decisions. *Id.* at 1297.

The safety concerns that motivated the widespread adoption of workplace drug-testing policies, particularly

for employees working in safety-sensitive positions in the petrochemical industry, are the essential foundation for a broad public policy against reinstating to a safety-sensitive position any employee who has refused, for whatever reason, to submit to a drug test. Reinstatement to a regulated, safety-sensitive position destroys public policy by undermining multiple, compelling safety interests. In addition, such a conclusion clearly violates public policy by undercutting every requirement that lawmakers and employers have adopted to ensure that employees who abuse drugs or alcohol are not employed in these positions. Despite this well-defined and strong policy against permitting those under the influence of illegal drugs or alcohol to engage in safety-sensitive work, the Third Circuit's decision encourages employees who believe they might test "positive" to refuse to submit whenever a "for-cause" test is requested, thereby defeating the very purpose of "for cause" testing and subverting its deterrence and detection impacts. For these reasons, the Institute urges this Court to grant the petition for a writ of certiorari, and to reverse the decision of the Court of Appeals.

ARGUMENT

I. A WELL-DEFINED AND DOMINANT PUBLIC POLICY DICTATES THAT DRUG- OR ALCOHOL-ABUSING EMPLOYEES NOT BE PERMITTED TO WORK IN SAFETY-SENSITIVE POSITIONS.

A. Each branch of the federal government repeatedly has enunciated a public policy that seeks to prevent drug- or alcohol-impaired employees from working in safety-sensitive positions.

A clearly defined and dominant public policy supports the removal of potentially drug- or alcohol-impaired workers from safety-sensitive positions. This policy has been expressed explicitly through Presidential actions, federal statutes, and a large volume of federal regulations.

The policy against employing substance abusers in safety-sensitive positions has been incorporated into fed-

eral law on several levels. Executive Order 12,564, issued by President Reagan, mandated that the heads of all executive agencies of the federal government establish a drug-free workplace. Congress enacted the Drug-Free Workplace Act, 41 U.S.C. app. § 701 *et seq.* (1994), which requires all federal contractors to establish a drug-abuse prevention program including education, counseling, and penalties for drug use. 41 U.S.C. app. § 702(a) (1994).

The U.S. Department of Transportation (DoT) and five operating agencies under its control established mandatory substance-abuse prevention requirements. The Federal Aviation Administration (FAA), the U.S. Coast Guard (USCG), the Federal Railroad Administration (FRA), the Federal Highway Administration (FHWA), and the Federal Transit Administration (FTA) promulgated detailed regulations in this area, all of which reflect the fundamental policy judgment that no drug- or alcohol-impaired employees should work in safety-sensitive positions in transportation operations.[1] The strong public policy behind these DoT regulations was definitively underscored by Congress in its enactment (by wide vote margins in both the Senate and the House of Representatives) of the Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C. app. § 2717 (1994).

Outside the transportation sector, the Departments of Energy (DoE) and Defense (DoD) also have promulgated regulations to ensure that safety-sensitive jobs are only performed by unimpaired individuals. DoE and DoD contractors must have programs to identify illegal drug users, including testing of employees in sensitive positions —that is, positions that pose dangers to public health

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[1] *See* 14 C.F.R. Part 121, Appendix I (1994) (FAA); 46 C.F.R. Part 16 (1994) (USCG); 49 C.F.R. Part 219 (1995) (FRA); 49 C.F.R. Part 382 (1995) (FHWA); 49 C.F.R. Part 653 (1994) (FTA).

and safety. 10 C.F.R. Ch. III, § 707.5(a)(1) (1994), 48 C.F.R. § 252.223-7004(c)(4)(i) (1994).[2]

There also is substantial precedent in the federal courts recognizing this public policy. This Court, in *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989), and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), confirmed the public policy against allowing impaired employees to work in safety-sensitive positions. In *Skinner*, the Court held that in light of the great potential harm that drug- or alcohol-impaired employees may cause in the railroad industry, railroad employees could be required to undergo drug and alcohol testing. Similarly, in *Von Raab*, the Court held that Customs employees who carry firearms could be subject to mandatory drug testing because of the dangers which substance-abuse impairment would pose for agents in their positions.

The Fifth, Ninth, First, and Third Circuit Courts of Appeals have considered whether public policy prevents the reinstatement of drug- or alcohol-abusing employees to safety-sensitive positions. Each of them has concluded that public policy strongly militates against such results.

For example, the Fifth Circuit has held that an otherwise valid arbitrator's award that ordered reinstatement of a drug-abusing employee in a safety-sensitive position, conditioned on passing a drug test, violated public policy. *Gulf Coast Industrial Workers Union v. Exxon Co. USA*, 991 F.2d 244, 249 (5th Cir. 1993), *cert. denied*, —— U.S. ——, 114 S. Ct. 441 (1993). The court noted, "[t]here are countless statutes, regulations, company guidelines, and judicial decisions that pronounce the emphatic national desire to eradicate illicit drugs from the workplace." *Id.*

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[2] *See also* 48 C.F.R. Part 1852 (1994) (National Aeronautics and Space Administration Drug Testing requirements for contractors); 10 C.F.R. Part 26 (1994) (Nuclear Regulatory Commission contractors testing requirements for nuclear plant employees.)

More recently, the Fifth Circuit broadened the scope of its decision to recognize the preemptive effect of the public policy against allowing drug- or alcohol-impaired employees to occupy safety-sensitive positions. It ruled that an arbitrator's award of back pay or reinstatement of an employee who tested "positive" for cocaine while employed in a safety-sensitive position, even where reinstatement would involve placement in a non-safety-sensitive job, also undermines public policy. *Exxon Corp. v. Baton Rouge Oil and Chemical Workers Union*, 77 F.3d 850 (5th Cir. 1996).[3]

Of course, as Petitioner notes, the Third Circuit also has specifically recognized a dominant public policy forbidding the reinstatement of employees who have tested "positive" to safety-sensitive positions. *See Exxon Shipping Co. v. Exxon Seamen's Union*, 11 F.3d 1189 (3d Cir. 1993) (Exxon II); *Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357 (3d Cir. 1993) (Exxon I). Nonetheless, in the decision at issue, the court placed primary emphasis on the issue of *how* the employee, Alan Cash, came to be asked to submit to a test, rather than the fundamental value and objectives of the testing policy itself.

In summary, every court which has considered the issue has agreed that an arbitrator's discretion on issues involving employee drug or alcohol abuse is circumscribed by the public policy against permitting safety-sensitive employees to engage in illicit drug and alcohol use.

B. The states have recognized that public policy forbids employment of drug- or alcohol-abusing employees in safety-sensitive positions.

A vast majority of the states also have recognized this public policy in one form or another. State legislatures

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[3] *See also, United Food & Commercial Workers v. Foster Poultry Farms*, 74 F.3d 169 (9th Cir. 1995); *Delta Air Lines v. Air Line Pilots Ass'n*, 861 F.2d 665 (1st Cir. 1988), *cert. denied*, 493 U.S. 871 (1989).

have enacted laws on drug-free workplaces, limitations on benefits, and workplace drug testing.

State unemployment compensation and workers' compensation laws also evidence this well-defined and dominant public policy against allowing impaired employees in the workplace. More than 20 unemployment compensation statutes explicitly deny unemployment benefits to workers who were dismissed due to alcohol or drug use.[4] In the absence of an explicit statutory provision, unemployment commissions in many other states faced with a worker dismissed for drug or alcohol use also have denied claims for unemployment benefits.[5]

Similarly, 39 states have enacted explicit statutory limitations on the receipt of workers' compensation benefits by an employee who is injured due to drug or alcohol use.[6] In the absence of statutory provisions for automatic denial of benefits, state courts also have denied intoxi-

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[4] *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 23-619.01 (1993) and 23-775 (1993) (benefits are denied to an employee who is discharged for willful misconduct which includes failure to pass or refusal to take a drug or alcohol test); ARK. CODE ANN. § 11-10-514(b) (Michie 1994) (benefits denied to employee discharged for reporting to work under the influence of alcohol or controlled substances); FLA. STAT. §§ 443.101-2 (West 1995) (benefits denied if discharge due to drug use; a "positive" drug test creates a rebuttable presumption of drug use); N.Y. LAB. LAW § 592 (McKinney 1993) (disqualification from benefits may result if person in safety-sensitive position tests "positive" for drug or alcohol use); OKLA. STAT. tit. 40, § 2-406A (1994) ("positive" test or refusal to test under program in compliance with state law disqualifies employee from benefits).

[5] *See, e.g., Dolan v. Svitak*, 527 N.W. 2d 621 (Neb. 1995); *Warren v. Employment Security Department*, 724 P.2d 227 (N.M. 1986); *Clevenger v. Employment Security Department*, 770 P.2d 866 (Nev. 1989); *Farm Fresh Dairy v. Blackburn*, 841 P.2d 1150 (Okla. 1992).

[6] *See, e.g.*, ME. REV. STAT. ANN. tit. 39-A, § 202 (West 1993) (no benefits if intoxicated when injury occurred, *unless* employer knew employee was intoxicated at the time of the injury or knew the employee had a habit of coming to work intoxicated); N.Y. WORK. COMP. LAW § 10 (McKinney 1993) (benefits denied if

cated employees these benefits.[7] While these statutes and rulings vary by state, the policy is manifestly clear in each case: employees should not be permitted to recover compensation when they intentionally endanger themselves and others by using drugs and alcohol.

II. PROHIBITING REINSTATEMENT OF SAFETY-SENSITIVE EMPLOYEES WHO REFUSE DRUG TESTS IS A NECESSARY COROLLARY OF THE PUBLIC POLICY WHICH GIVES PRIORITY TO PUBLIC, WORKPLACE, AND ENVIRONMENTAL SAFETY.

A. Reinstatement violates public policy because it encourages employees to refuse drug or alcohol tests and undermines the ability of drug-testing programs to identify drug abusers.

If a worker is allowed to refuse a drug test without facing sanctions at least as severe as those for a "positive" drug test, all employees who would test "positive" for drugs simply will refuse the test and accept a lesser sanction. This result effectively would condone drug use, and thereby endanger the employee, his or her co-workers, the public, and the environment. A lesser sanction for a refusal-to-test destroys the effectiveness of drug-testing programs. The federal and state governments, and other courts, have recognized this problem, and treat a "refusal-to-test" in a similar fashion to a "positive" test result.

The federal agencies recognize the futility of a drug-abuse prevention program that does not at least provide

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injury is caused solely by use of controlled substances); PA. STAT. ANN. tit. 77 § 431 (Supp. 1995) (benefits denied if injury caused by intoxication or use of illegal drugs); R.I. GEN. LAWS § 28-33-2 (1986) (benefits denied if injury caused by intoxication or use of illegal drugs).

[7] *See, e.g., Banks v. Dep't of Educ.*, 462 S.W.2d 428 (Ky. 1971); *Nekoosa-Edwards Paper Co. v. Indus. Com.*, 141 N.W. 1013 (Wis. 1913). Both cases predate current statutes disqualifying intoxicated employees from collecting benefits.

identical sanctions for a "positive" test result and a refusal-to-test. Consequently, in virtually every instance, the federal government has equated a refusal-to-test with a "positive" test result for determining of sanctions.

All the DoT regulations equate a refusal-to-test with a "positive" test result. For example, the FAA regulations provide that no person can be employed in a safety-sensitive position who has failed *or* refused to submit to a drug test, 14 C.F.R. Ch. I, § 121.455(c) (1994), unless it is subsequently determined that he or she is fit for duty. 14 C.F.R. Ch. I, § 121.455(d) (1994). Similarly, the USCG regulations provide that an individual holding a license, certificate of registry, or merchant mariner's document who refuses to submit to a test under the regulations will be subject to suspension and revocation proceedings. 46 C.F.R. § 4.06-5(c) (1994). Additionally, the concern that drug-using individuals are the most likely to refuse a test led the USCG to provide that *all* individuals, including the grievant in this case, who refuse to be tested *must* be removed from any duties which directly affect the safety of a vessel's navigation or operations. 46 C.F.R. § 4.06-5(c) (1994). *See also* 49 C.F.R. §§ 219.603(b), 219.213, 219.505, 219.605(e) (1994) (FRA sanctions for refusal to provide a sample); 49 C.F.R. §§ 391.117(a) to 391.117(b) (1994) (FHWA disqualifications); 49 C.F.R. § 653.9(a)(1)(iii) (1994) (FTA regulations); 10 C.F.R. Ch. I, § 26.27(c) (1994) (NRC requirements).

Many states also have recognized the necessity of equating a refusal-to-test with a "positive" test result. Of the nine states whose laws specifically address the subject, three explicitly equate a refusal-to-test with a "positive" test result,[8] and six allow the employer to determine the

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[8] MISS. CODE ANN. §§ 71-7-1 to -31 (1993) (refusal-to-test for pre-employment test is valid basis for refusal to hire; posted policy must state consequences of refusal-to-test); OKLA. STAT. tit. 40, §§ 551-565 (1994) (a confirmed "positive" test or a refusal-to-test is valid

sanctions for a refusal-to-test.[9]

Several state unemployment compensation laws also reflect the public policy against permitting a person who has refused a drug test to obtain benefits through the statutory mechanism.[10] In states without an express statutory provision, this policy is reflected in case law through the denial of unemployment benefits because of an applicant's refusal to submit to a drug test. The courts and unemployment compensation commissions routinely deny benefits for terminations triggered by employee refusals to test, holding that such refusals constitute "gross" or "willful" misconduct sufficient to justify disqualification from eligibility. *See, e.g., Farm Fresh Dairy v. Blackburn*, 841 P.2d 1150 (Okla. 1992) (collecting cases). Similarly, several state workers' compensation laws evidence the public policy against allowing a worker who refuses a drug test to receive less severe sanctions than a worker who receives a "positive" test result.[11]

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basis for refusal to hire; posted policy must state consequences of refusal-to-test); UTAH CODE ANN. §§ 34-38-1 to -15 (1993) (refusal to submit to test, like a "positive" test result, allows the employer to suspend, discharge, or discipline the employee, or deny employment to a job applicant).

[9] 1995 Ala. Acts 535 (employer must give notice of consequences of refusal-to-test); FLA. STAT. ANN. § 627.0915 (West 1993) (employer must post consequences of refusal-to-test); GA. CODE ANN. §§ 34-9-410-420 (Michie 1993) (must post consequences of "positive" test result or refusal-to-test); ME. REV. STAT. ANN. tit. 26 §§ 618-690 (West 1993) (employer must advise employees of consequences of refusal); MINN. STAT. §§ 181.950-957 (1993) (employer must advise employees of consequences of refusal); 1996 Wash. Legis. Serv. 127 (West) (effective June 6, 1996) (employer may terminate employees for refusing a test).

[10] *See, e.g.*, CONN. GEN. STAT. § 31-236 (1992) (benefits denied to an employee who is discharged for violating employer drug policy if policy is established in accordance with Connecticut law); LA. REV. STAT. ANN. §§ 23:1601 (West 1992) (refusal-to-test is considered grounds for denial of compensation).

[11] *See e.g.*, ALA. CODE § 25-5-51 (1993) (injured employee who refuses test is denied benefits); FLA. STAT. ANN. § 440.101 (West

The many decisions issued by federal and state courts in cases alleging wrongful discharge and similar common-law torts also highlight the strong public policy against reinstatement of employees who refuse drug tests. *See, e.g., Baggs v. Eagle-Picher Industries, Inc.*, 957 F.2d 268 (6th Cir. 1992), *cert. denied*, 506 U.S. 975 (1992) (no cause of action for discharge following refusal-to-test); *Monroe v. Consolidated Freightways, Inc.*, 654 F. Supp. 661 (E.D. Mo. 1987) (discharge for refusal upheld); *Luedtke v. Nabors Alaska Drilling*, 834 P.2d 1220 (Alaska 1992) (employees may submit to test or refuse and resign); *Folmsbee v. Tech Tool Grinding and Supply, Inc.*, 630 N.E.2d 586 (Mass. 1994) (discharge for refusal-to-test upheld); *Gilmore v. Enogex, Inc.*, 878 P.2d 360 (Okla. 1994) (interest in drug-free workplace justifies termination for failure to test).

B. Employers with strong and effective drug-testing programs properly treat a "refusal to test" at least as severely as a "positive" test result.

For a drug-testing program to be effective, there have to be severe sanctions which employees *know* will result if they violate the policy. A drug-testing program in which an employee can avoid the consequences of a "positive" test result by *refusing* a drug test is essentially worthless. Such a policy would destroy the effectiveness of workplace drug-testing programs. Detection abilities are irrelevant when an employee can refuse a test. Deterrence—including the fear of being caught—is destroyed when employees know they can avoid the consequences of a "positive" test by simply refusing to submit.

A recent survey of the Institute's members demonstrated that American employers have adopted policies that equate a "refusal-to-test" with a "positive" test result—or as insubordination. Of 51 Institute members who re-

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1993) (refusal to test leads to presumption that employee impaired and ineligible for medical and indemnity benefits).

sponded to the survey question "Does your company equate an employee's or a job applicant's refusal to be drug tested with a confirmed drug-test "positive" for adverse employment action purposes?," 45 answered "yes." The remaining six respondents stated that a drug-test refusal is treated more severely than a "positive" drug-test result. In the words of one member, "If there are no consequences to a refusal to be tested, then there is no program to keep substance abusers out of the workplace." [12]

Thus, the experience of private sector employers confirms the judgment of regulators that a comprehensive drug-testing program which equates a refusal-to-test with a "positive" test result is a necessary and efficient means of preventing harmful accidents. Each successful workplace program confirms that drug and alcohol testing help achieve the public policy goals expressed through the numerous federal and state expressions of public policy.

To permit refusals-to-test to *not* trigger the same adverse employment action as a "positive" test result is to render the drug-testing program meaningless—no one who *could* test "positive" would agree to a test and the "positive" rate likely would be 0.0 percent. The effectiveness of drug testing and workplace substance-abuse programs should not be crippled by permitting a refusal-to-test to carry no sanction or a lighter sanction than a "positive" test result.

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[12] Institute for A Drug-Free Workplace. *"Member Survey: Workplace Policies Regarding a Refusal-to-Test."* Washington, D.C. (May 1996).

C. Reinstatement of employees who refuse drug or alcohol tests violates public policy because it drastically interferes with employer efforts to avoid the placement in hazardous positions of employees who abuse illegal drugs or alcohol.

Employers with safety-sensitive operations hire from a population in which nearly three-quarters of America's illicit drug users are employed. The U.S. Department of Health and Human Services estimates that one out of every four Americans is directly affected by the alcohol or drug dependency of a family member, friend, or co-worker.[18]

Companies with employees who perform safety-sensitive tasks must be able to decrease the likelihood of accidents which have substantial—and sometimes tragic—human, economic, and environmental costs. In addition, these companies have a statutory duty to ensure safe and healthy workplaces for all of their employees. 29 U.S.C.A. § 654 (a)(1) (1985). Furthermore, employers are liable in tort to individuals who suffer personal injury and/or property damage as a result of an accident. Where catastrophic events occur as the result of the drug or alcohol use of employees in safety-sensitive positions, the financial consequences can be staggering. Thus, companies clearly need to be able to reduce the likelihood of accidents, not only because of the severe economic burden that the company would face in the wake of such an accident, but also because of the human suffering and harm that would befall society.

Drug and alcohol use substantially impact workplace safety. For example, drug-using employees were found to be 3.6 times more likely to be involved in a workplace accident than are employees who do not use drugs. Thomas E. Backer, *Strategic Planning for Workplace*

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[18] Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services, *1994 National Household Survey on Drug Abuse* (September 1995).

Drug-Abuse Problems, National Institute on Drug Abuse, at 4 (1987). In addition, a Utah Power and Light study estimated that employees testing "positive" on preemployment drug tests were five times more likely to be involved in a workplace accident than those who tested "negative." [14]

Given the magnitude of the nation's drug- and alcohol-abuse problems, it would be naive to assume that employees in safety-sensitive positions do not abuse drugs or alcohol. In fact, the latest drug-test "positive" figures show otherwise: 6.7 percent of the 3.75 million employees and applicants who were tested for drugs at SmithKline Beecham laboratories in 1995 tested "positive." SmithKline Beecham, *Drug Testing Index* (March 1, 1996). Of more direct relevance and significance, out of more than 784,000 drug tests performed by that one commercial laboratory on safety-sensitive transportation workers, 3.5 percent tested "positive" for illegal drug use. That percentage indicates that *at least* 27,740 individuals in the transportation industry in safety-sensitive jobs who *knew* they were subject to periodic testing *still* tested "positive" for illicit drug use. *Id.*

Furthermore, in a recent national survey of employees, 35 percent of full-time employees surveyed by the Gallup Organization said they had "personally seen or heard of" illicit drug use on the job, and 43 percent said that drug use in their workplace "seriously affects their ability to get the job done." *Survey of 1,006 Full-Time Employees, Aged 18 and Older, Working Outside of the Home,* Gallup Organization, Princeton, New Jersey, (November 1995). In addition, 59 percent agreed that alcohol abuse is a major workplace problem. *Id.*

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[14] Dennis Crouch, M. Birky, et al., National Institute on Drug Abuse, *A Critical Evaluation of the Utah Power and Light Company's Substance-Abuse Management Program: Absenteeism, Accidents, and Costs,* Drugs in the Workplace: Research and Evaluation Data, at 169-93 (1989).

The devastating effects of alcohol- and drug-impaired employees are evident in several studies. Between 1975 and 1986, more than 50 train accidents were directly attributed to drug or alcohol abuse. These accidents resulted in 37 fatalities, 80 injuries, and more than $34 million in property damage. *Battling the Enemy Within*, Time, March 17, 1986, at 52. Other studies have documented declines in workplace accidents after substance-abuse problems were decreased or eliminated through workplace drug testing. For example, a survey of construction industry companies revealed that where substance-abuse testing was implemented, workplace accidents declined by 34 percent. National Association of Plumbing-Heating-Cooling Contractors, *The Construction Industry Survey on Substance Abuse* (April 1992).

Studies of workers who test "positive" for drug use establish that the costs of workplace substance abuse can be cut following implementation of substance-abuse detection programs. For example, in a retrospective study, the U.S. Post Office estimated that it could have achieved net savings of 105 million dollars within five years by *not* hiring job applicants who tested "positive" on pre-employment drug tests *in one year alone*. United States Postal Service, Personnel Research & Development Branch, Office of Selection and Evaluation, *Preemployment Drug Testing: Associations with EAP, Disciplinary, and Medical Claims Information* (July 1992).

Legislators, regulators, and employers have relied on this information and similar data in formulating policies and strategies to protect the public from those well-documented harms. If arbitrators and courts effectively mandate that an employee's refusal to submit to drug testing is sanctioned less severely than a "positive" drug-test result, they will destroy the underlying purposes of these laws, regulations, and policies, and place the public at risk.

D. Reinstatement of a safety-sensitive employee who refused to test sends the wrong signal to courts, arbitrators, employers, and employees regarding a compelling public policy concern.

Reinstatement of Mr. Cash would subvert public policy, and send a jarring signal to employers that work strenuously to achieve the goal of a drug-free workplace, particularly in safety-sensitive environments. Rather than reinforcing the clear and dominant policy direction of government at all levels, the Third Circuit's decision—if undisturbed—will prevent employers from carrying out their legal duties, and securing all potentially affected parties and interests from potentially catastrophic harm. It will condone employee misconduct—refusing to test—and undermine a highly legitimate, widely accepted, and absolutely necessary tool in achieving a crucial social goal.

As the Fifth Circuit recognized in *Exxon Corp. v. Baton Rouge Oil and Chemical Workers' Union, supra*, the compelling public policy against drug use in safety-sensitive positions can be weakened by an arbitrator's reinstatement or back pay order. For that reason, the court concluded that this precise public policy takes compelling precedence over the discretion that the arbitrator ordinarily would have to interpret the collective bargaining agreement. In contrast, the ruling of the Third Circuit in this proceeding improperly subordinates this critical interest, and would serve as an obstacle to the eradication of illicit drug use in safety-sensitive positions. It would improperly insulate employee action at odds with the goals and methodology embraced by the government and private employers, and otherwise tend to perpetuate the very harm which public policy seeks to avoid.

The net effect of the Third Circuit's decision, if widely applied, would be to put and keep *more* drug abusers in safety-sensitive jobs. How can that possibly be a good thing? Our court system should enthusiastically embrace the fundamental concept that drug abusers should *not* be

in safety-sensitive jobs. The courts should—as they generally have—send the right signal to America by not forcing employers to hire or retain those who could do the most harm in those positions.[16]

Workplace drug and alcohol abuse clearly presents unique problems, not only for employers but for society as well. Drug and alcohol abuse repeatedly has been shown to have disastrously harmful effects in the workplace and in the community. Employer practices throughout the country have proven that comprehensive drug-testing programs with known, uniform consequences are the most effective means of preventing the potential harm that employee drug abuse can cause. The effectiveness of drug testing, however, is severely compromised when refusals to submit to testing are sanctioned less severely than are "positive" test results.

Clear tenets of public policy argue against allowing impaired employees and employees who refuse a drug test to perform safety-sensitive jobs. The Institute urges the Court to recognize the commonly understood and accepted components of a drug-testing program, and to allow employers to better protect their employees, the public, the environment, and their business interests. The Court can accomplish this by preserving employers' rights to have meaningful and effective drug-testing programs, and to continue—*as is the practice of virtually all employers*—to consider "refusals-to-test" the equivalent of "positive" drug tests.

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[16] *See, e.g., Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840 (2d Cir. 1990), *cert. denied*, 499 U.S. 922 (1991) (arbitrator's reinstatement of employee terminated for sexual harassment vacated due to conflict with and adverse effect upon public policy interests).

CONCLUSION

The Institute for a Drug-Free Workplace respectfully urges the Court to grant the writ of certiorari to review the judgment below, to reverse the rulings that would require the reinstatement of Mr. Cash despite his misconduct and violation of company policy—specifically, his refusal to submit to a drug test—and to recognize that his mandated reinstatement would violate public policy.

Respectfully submitted,

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